

United States
Circuit Court of Appeals
For the Ninth Circuit.

Transcript of Record.
(IN TWO VOLUMES.)

THE ARIZONA AND NEW MEXICO RAILWAY
COMPANY, a Corporation,

Plaintiff in Error,

vs.

THOMAS P. CLARK,

Defendant in Error.

VOLUME II.
(Pages 305 to 697, Inclusive.)

Upon Writ of Error to the United States District Court of
the District of Arizona.

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(Testimony of Mrs. Thomas P. Clark.)

Q. Did you hear the conversation between Dr. Smith and Mr. Clark, if any conversation occurred?

Mr. SEABURY.—We object to the question as not proper cross-examination.

The COURT.—The objection is sustained to that.
(By Mr. McFARLAND.)

Q. You say that Dr. Dietrich bandaged his ribs? Did I understand you correctly in that respect to that? A. Yes, sir.

Q. And treated him for those broken ribs?

[315] Well—

Q. Or injured ribs, as the case may be? Did you answer? A. I suppose so.

Q. He also treated him for pneumonia if he had pneumonia, did he?

Mr. SEABURY.—We object to the question. It is argumentative in form—hypothetical. Improper in form and not proper cross-examination. We haven't attempted to show what the treatment was. She testified what she did to him practically as a nurse.

The COURT.—Wasn't she interrogated with regard to what medical attendance he had?

Mr. SEABURY.—I think she was.

The COURT.—Then this would be cross-examination. I overrule the objection.

Mr. SEABURY.—We except.

(Thereupon at request of counsel the reporter reads the last question propounded.)

The WITNESS.—Yes, sir.

(Testimony of Mrs. Thomas P. Clark.)

(By Mr. McFARLAND.)

Q. Also any bruises or trouble with his hip and back? A. Yes, sir.

Q. All those treatments were successful?

A. Well, the nurse had charge of Mr. Clark during this time. I wasn't present all the time. I was sick myself. The nurse had charge of Mr. Clark.

Q. After this treatment he got up and was out?

Mr. KEARNEY.—We object to the question as not cross-examination.

The COURT.—She may answer that question.

[316] The WITNESS.—It was a couple of weeks or such a matter before he was allowed to go out.

(By Mr. McFARLAND.)

Q. I understood you to say in your examination that he walked around in the yard.

A. After the examination?

Q. In your previous testimony. In answer to some questions asked you by Mr. Clark's counsel you said, if I remember, that in about two weeks he walked out in the yard.

A. He walked out a little while in the yard.

Q. He has not been confined to his bed since that, has he?

A. Not all the time, but a good part of the time. He couldn't sit up all day.

Q. In the last year has he been confined to his bed?

A. Some times during the day. He isn't able to sit up all day.

Q. As a rule, doesn't he walk around town and

(Testimony of Mrs. Thomas P. Clark.)

other places where he happens to be, at his will and pleasure? A. Yes, he goes down town.

Q. Do you notice any difference in his walking around now and before the accident?

A. I certainly do.

Q. In what respect?

A. He is feeble now. He has no strength, apparently.

Q. But he does go around unassisted anywhere he wants to go?

A. Yes, I think he is able to take care of himself.

Q. He doesn't walk with a cane, does he?

A. No, he doesn't yet, not that I know of.

Q. Otherwise, than you say he is weak, you see no difference in his condition now and before the accident.

[317] A. There is a decided difference in his condition now and before the accident.

Q. In what respect? A. He is weak.

Q. I say, other than that there is no difference.

A. Yes.

Q. What?

A. He complains of his side all the time. He complains of this pressure here (indicating chest) which on the least exertion he has to cough.

Q. Does he cough when he is walking around town? A. Sometimes.

Q. Are you with him on those occasions?

A. Sometimes I am and sometimes not.

Q. You only know when you are present?

(Testimony of Mrs. Thomas P. Clark.)

A. He would prefer that I go with him all the time.

Q. As a matter of fact, you don't go with him all the time? A. I do not.

Q. So you don't know what occurs when you are not with him?

A. I can't say that I do, exactly.

Q. Now, you say there was a lump on the back of Mr. Clark's head the day immediately after the accident—a lump on the back of his head.

A. I didn't notice that immediately after the accident.

Q. Sometime that same day?

A. Along in the night, I believe.

Q. Now, I understand you to say that lump was not there the previous day. A. It was not.

Q. Now, will you explain to the jury how you knew that lump [318] was not there the previous day or previous to that?

A. I know this: That I almost always got Mr. Clark ready to go out. I generally comb his hair. That is how I know the condition of his head.

Q. You always combed his hair?

A. Most always; not always. Especially in the morning when he was in a hurry I got him ready so he was always on time.

Q. Now, did that preparation consist of anything except combing his hair?

A. I helped him on with his engine clothes and prepared him for the day.

Q. And you are quite positive that the day pre-

(Testimony of Mrs. Thomas P. Clark.)

vious to the accident you combed his hair and didn't see any trouble with the back of his head?

A. Yes, sir.

Q. Quite sure about that? A. Yes, sir.

(By Mr. KIBBEY.)

Q. How frequently did Dr. Dietrich visit there the first eight days? A. How often, do you say?

Q. Yes.

A. Well, the first day I think he was there probably three or four times.

Q. And the next day? A. Probably the same.

Q. And the next? A. That I couldn't say.

Q. But he did visit on each of those days for the first eight days? [319] A. Yes, sir.

Q. Now, you were present at those visits?

A. Not always, no. I was confined to my bed most of the time.

Q. Were you within hearing distance?

A. Yes, sir.

Q. You could hear if there was any conversation between Dr. Dietrich and your husband?

A. Well, I —(hesitating).

Mr. KIBBEY.—That is all.

(The witness is excused.)

Mr. SEABURY.—Plaintiff rests, if your Honor please.

The COURT.—We will take a recess for five minutes—meanwhile, gentlemen of the jury, don't talk about the case among yourselves or with anyone else. Come back in five minutes.

(Thereupon the Court takes a recess.)

At two-forty P. M., the plaintiff being present in person and by his counsel and the defendant by its counsel, the jurors return into court and are called by the clerk, all answering to their names, and thereupon the following further proceedings are had herein, to wit:

Mr. McFARLAND.—We desire at this time to make a motion and now move the Court to direct a verdict for the defendant on the ground that it is not shown that at the date of the accident that the defendant nor the plaintiff were engaged in interstate commerce. The uncontradictory testimony in the case is that the plaintiff and the defendant were engaged in switching cars on the tracks—the main line and the side tracks—of the defendant within its yards; that the injury is alleged in the complaint to have occurred on the 15th day of March, 1911, while [320] the plaintiff and defendant were engaged in interstate commerce. At the bottom of the first page of the complaint it is alleged— (Thereupon counsel reads from the complaint at length.) Now, the position we take, if your Honor please, is that switching in yards is not interstate commerce. I read the excerpts from this complaint to show that it is based—the liability is based—upon the negligence of the defendant while engaged in interstate commerce. The Federal Employer's Liability Act provides that when a railway company is engaged in interstate commerce and any injury happens as a result of the negligence of the defendant while so engaged, it is a liability of the railway company.

Now, the theory of this complaint—every line of it—in fact, its breath runs through every utterance in this complaint—that the injury occurred and the damage was received by the plaintiff while he and the defendant were engaged in interstate commerce. If that is not true as a legal proposition from the facts as admitted and uncontradicted, then the plaintiff in this case cannot recover in this action. Very fortunately for us the Court of Appeals of the Third Circuit handed down an opinion on June 21st, 1912, on this very question as to whether trains switched in yards of the company was interstate commerce. Now, the theory as indicated possibly by the testimony of one of their witnesses, was whether this injury occurred while the cars were in transit between the initial and final point on the line of the defendant, or whether it occurred after the cars had reached their destination in the yards of the company and had been turned over to the switching crew for their operation. The Court will take judicial notice that there are two kinds of crews in all railroad service—one a train crew and the other a switching crew, [321] and our contention is whenever the switching crew get control of the cars that come from the main line of the road, and begin their operation of switching, then it ceases to be impressed with interstate carriage and becomes one under the local law. This case, if the Court please, is Erie Railway Company vs. The United States; it is reported in the advance sheets of the Federal Reporter under date September 19th, 1912, and is

reported in volume 197, at pages 287 to 292, inclusive. This was an action by the Government against the railway company for violating the safety appliance act while switching its cars in its yards over its switches and main line and around in its yards after it had been turned over—in other words, after the train crew had ceased to control or operate it, and after the switching crew had taken charge of it and were performing the operations of switching in the yards of the company. Now, the lower court held that it was interstate commerce—the district or Circuit Court as the case may be. On appeal to the Court of Appeals it was reversed on the ground that the operation of the defendant in switching in its yards—in its terminals—was not interstate commerce, and sent the case back for a new trial. That was the only case involved in this case—the single question decided by the lower court that it was interstate commerce if they were handling interstate cars. The Court of Appeals held on appeal that, although they were interstate cars, yet if they had gone into the hands of the switching crew and were being switched from point to point in its yards, it was not interstate commerce, but was governed by local law. Now, the safety appliance act is exactly like the federal employer's liability act in relation to interstate commerce, except that the safety appliance act provides that a railway company shall [322] not operate cars upon its lines unless it has the appliances provided for in the safety appliance act; but it must be engaged in in-

terstate commerce. The Federal Employer's Liability Act says that the company shall be liable or will be liable to the plaintiff in the event that an injury happens while engaged in interstate commerce. As I say, this complaint is drawn upon that theory—it is based upon that theory. The testimony of the case conclusively shows that the effort of the plaintiff in this case has been at all times to show that it was engaged in interstate commerce at the time of this accident, when it was engaged exclusively and alone in switching.

(Thereupon counsel reads portions of the decision in the case above cited.) And there is one other good reason for this: Railway companies frequently do not operate terminals at all; it is done by independent terminal companies; and the same conditions would apply to a railway as would apply to an independent company.

The COURT.—You think, assuming that you are right in that question of law, do you think that the complaint may not be sustained—I mean that this case may not be given to the jury upon the issue as to whether this defendant was a common carrier?

Mr. McFARLAND.—I don't think so. It is alleged—

The COURT.—I know, but doesn't it also imply; the very allegations with reference to its interstate commerce business imply that it was a common carrier. They may have alleged more than they needed to. But assuming that it was a common carrier and assuming that the necessary effect of the allegations

in the complaint be that the defendant was a common carrier and that the accident occurred at the time we were a territory?

Mr. McFARLAND.—That would be very true and I imagined that would come from the other side.

[323] The COURT.—It is proper to come from the Court before he instructs the jury.

Mr. McFARLAND.—Certainly.

The COURT.—This is an application to the Court to instruct the jury, and he will not do that unless advised properly.

Mr. McFARLAND.—I would have advised the Court along that line further if I had not thought that the reply would come from the other side along those lines, and the Court would give me an opportunity to reply to them. That would be true if the cause of action were based upon the theory that they were liable by reason of the fact that this was a territory and that the injury occurred at the time we were a territory, but you can't allege and prove a case along one theory and then apply it to another.

The COURT.—Why not? Suppose the plaintiff was absolutely in error about the law, but suppose the facts alleged entitled him to relief, does it make any difference whether he knew the law or not? Isn't the Court bound to apply the law, not according to the theory of the complaint, but according to the legal effect?

(Thereupon the question is argued further to the Court by counsel, the argument not being taken down by the reporter.)

The COURT.—I get your view point and you may be right on this subject of interstate commerce. I will have to look into that more carefully, however, before I find the rule.

Mr. McFARLAND.—The Court should bear in mind that interstate commerce gives this Court jurisdiction under the Federal Employer's Liability Act.

The COURT.—Yes, if the cause had originated after the admission of the State, but as it originates when we are a territory—

[324] Mr. McFARLAND.—But it was brought on the ground that we are engaged in interstate commerce.

The COURT.—You may be right as to that, but it seems to me the facts are sufficiently charged to indicate that the defendant was a common carrier and therefore sufficient is alleged in the complaint to sustain proof as to that fact and then to give the Court jurisdiction to grant relief.

Mr. McFARLAND.—Does your Honor claim that the mere fact that the railway company is a common carrier would give jurisdiction under the Federal Employer's Liability Act?

The COURT.—So long as we were a territory.

Mr. McFARLAND.—But independent of that fact?

The COURT.—No, it would not.

Mr. McFARLAND.—Unless it was interstate commerce.

The COURT.—That is true.

(Testimony of R. C. Bond.)

Mr. McFARLAND.—Now, if the complaint had been drawn on the theory that we were a territory and therefore the act applied independent of interstate commerce—

The COURT.—Then we get back to the proposition that we discussed before: that the plaintiff may have been ignorant of the law—which, of course, we do not assume. Under the law a common carrier must be a common carrier if engaged in interstate commerce, so the jurisdiction of the Court could rest upon either or both, assuming you are right as to the interstate commerce proposition. It rests upon either, not upon both.

Mr. McFARLAND.—The Court will have to take judicial notice then that we were a territory, though it is not alleged.

The COURT.—I think I may do that. I do not think it even has to be proven or alleged. The Court will take judicial [325] knowledge of the change of political status. The motion will be overruled.

Mr. McFARLAND.—To which we except.

[Testimony of R. C. Bond, for Defendant.]

R. C. BOND, being called as a witness in behalf of the defendant and duly sworn, testifies as follows:

Direct Examination.

(By Mr. KIBBEY.)

Q. State your name. A. R. C. Bond.

Q. What is your business?

A. Surveyor and draughtsman for the A. C. Company and the A. & N. M. Railway.

(Testimony of R. C. Bond.)

Q. How long have you been employed in that capacity? A. Five years.

Q. What experience have you had in field work?

A. Just with the Arizona Copper Company and the A. & N. M. Railway Company five years.

Q. How continuously have you been employed in that work?

A. Well, perhaps half the time in field work and half inside work.

Q. During that period? A. Yes, sir.

Q. Do you know the A. & N. M. Railroad—that part of its track between the bridge over the San Francisco River and the Shannon switch?

A. Yes, sir.

Q. Did you at any time make any measurements of the grade of that road? A. Yes, sir.

Q. When? A. About some time in April, 1911.

[326] Q. Do you remember the fact of an accident occurring there in which Mr. Clark was injured? A. Yes, sir.

Q. Was it before or after that?

A. It was about three weeks after that, I judge.

Q. Do you remember the fact of any block signals put in? A. I don't remember that.

Q. Was this survey made before that or after?

A.

Q. Did you make a drawing as a result of that survey? A. Yes, sir.

Q. Have you that with you?

A. Yes, sir. It is over there in the chair.

Q. Here in the building? A. Yes, sir.

(Testimony of R. C. Bond.)

Q. (Handing tracing to the witness.) You may state what this— (To the Court.) Had I better have it marked?

The COURT.—Yes.

(Thereupon the tracing in question is marked Defendant's Exhibit "A" for identification.)

(By Mr. KIBBEY.)

Q. I now show you a paper marked Defendant's Exhibit "A" for identification and ask you to state what that is. I ask generally if that is a correct map or diagram showing the grade of that part of the A. & N. M. Railroad from the bridge to the Shannon switch?

Mr. SEABURY.—To that we object on the ground that no proper foundation has been laid for its introduction, and the witness has not qualified as a competent surveyor or engineer.

The COURT.—I understood him to say that was his business.

[327] Mr. SEABURY.—All he said was that he had experience for five years with the Arizona Copper Company and the A. & N. M.

The COURT.—The objection is overruled. I think that is sufficient.

Mr. SEABURY.—We except.

(By Mr. KIBBEY.)

Q. Is that a correct map or platting of that grade?

A. It is as far as I know.

Q. Who made it?

A. I took the notes and made the drawing and profile.

(Testimony of R. C. Bond.)

Q. You made the drawing and profile?

A. Yes, sir.

Q. What is the horizontal scale of this?

A. Ten inches to the foot—ten feet to the inch, I mean.

Q. How about the vertical?

A. That is the same.

Q. The vertical and horizontal are the same?

A. Yes, sir.

Mr. KIBBEY.—I would like to exhibit this to the jury with an explanation of the different marks there may be on it.

Mr. SEABURY.—Has it been received in evidence?

Mr. KIBBEY.—I will offer it.

Mr. SEABURY.—I object to the map as not sufficiently proved and there being no evidence before the Court to determine as to what time this purports to disclose the condition.

Mr. KIBBEY.—About three weeks after the accident.

Mr. SEABURY.—We object that it shows the condition after the accident and is not competent to prove the condition at the time of the accident.

The COURT.—I overrule the objection.

[328] Mr. SEABURY.—We except.

Mr. KIBBEY.—It may be exhibited then?

The COURT.—After it has been marked.

(Thereupon the map in question is received in evidence and marked by the clerk, Defendant's Exhibit "A.")

(Testimony of R. C. Bond.)

(By Mr. KIBBEY.)

Q. Now, Mr. Bond, please state what is this at the end of the map. (Indicating a mark on the map and at the same time exhibiting it to the jury.)

A. All readings were taken from the Shannon switch point to the first caisson of the San Francisco river bridge.

Q. What do you mean by "caisson"?

A. Supports.

Q. What is the measurements taken from—Shannon switch? A. Yes, sir.

Q. Shannon switch is indicated by appropriate words or letters on the map?

A. Yes, sir—"Shannon switch point."

Q. What is the distance from Shannon switch to the first caisson of the bridge?

A. Eight hundred and forty-six and six-tenths feet.

Q. What is the alignment of the track—straight or on a curve?

A. It is straight for about six hundred feet, I should judge, and then there is a curve.

Q. Where is the curve?

A. At the bridge. It begins about six hundred feet from the switch.

Q. About how much of that is straight track from the bridge to Shannon switch?

[329] A. About six hundred feet.

Q. Now, then, will you indicate the grade of that track beginning at the Shannon switch clear to the bridge at intervals of twenty-five feet? Have you

(Testimony of R. C. Bond.)

noted it on here? A. Yes, sir.

Q. Now, will you state that, both in percentages and also in the actual amount of grade, either up or down, from point to point?

A. It is .2% down for the first 25 feet, or a difference of $\frac{5}{8}$ inch. The next is .1% down for 75 ft. or a difference of $\frac{7}{8}$ inch in 75 feet.

Q. You are now going toward the bridge?

A. Yes, sir. The next is .28% down for 25 feet or a difference of $\frac{5}{8}$ inch; the next is .1% down for fifty feet or a difference of $\frac{7}{8}$ inch in fifty feet; the next is .1% up for 25 ft. or $\frac{5}{16}$ inch difference; the next is .1% down for 25 ft. or $\frac{5}{16}$ inch; the next is .1% up or $\frac{5}{16}$ inch difference; the next is .1% down or $\frac{5}{16}$ inch difference; the next of .48% up or $1\frac{7}{16}$ inches difference; the next is .1% up for one hundred feet or $1\frac{3}{16}$ difference; the next is .1% down for twenty-five feet or $\frac{5}{16}$ inch difference; the next is .1% up for 25 ft. or $\frac{5}{16}$ inch difference; the next is .48% up for 25 ft. or $1\frac{7}{16}$ inches difference; the next is .1% up for 50 ft. or $\frac{5}{8}$ inch difference.

A JUROR.—What is this here in regard to that crossing?

The WITNESS.—That shows the crossing to be about five hundred and fifty feet from the switch point. The next is .28% up for 25 ft. or $\frac{7}{8}$ inch difference; the next one is level for 25 ft.; the next is .4% up or $1\frac{3}{16}$ difference for 25 ft.; the next is .68% up for 25 ft. or $2\frac{1}{10}$ inches difference; [330] the next is .1% up or $\frac{5}{8}$ inch difference for fifty feet; the next is .2% down or $\frac{5}{8}$ inch difference for

(Testimony of R. C. Bond.)

twenty-five feet; the next is .4% down or $1 \frac{3}{16}$ inches in twenty-five feet; the next is .24% down or $\frac{3}{4}$ inch; the next is .2% or $\frac{5}{8}$ inch; the next twenty-five feet is level, and the next is .1% up for twenty-five feet or $\frac{5}{16}$ inch difference, and the last twenty-five feet is level.

Q. What is the average grade?

A. I don't know what the average grade is.

Q. Can you figure it?

A. Surely. (Witness figures.) It would be about five one hundredths per cent. That is not absolutely correct.

Q. That would be how much in the entire distance—how much difference in elevation?

A. The total distance about four and one quarter inches, or thirty-five one hundredths of a foot.

Q. Which is the higher point?

A. The bridge end.

Q. How far would you have to go from the bridge until you assumed that average going toward the Shannon switch?

A. You wouldn't have to go very far before you got to it.

A JUROR.—Whereabouts is the crossing?

The WITNESS.—About in here. (Indicating.) Five hundred and fifty or seventy-five feet from the San Francisco river.

The JUROR.—At the far end is where it crosses the river?

The WITNESS.—Yes, at the bridge end.

(Testimony of R. C. Bond.)

(By Mr. KIBBEY.)

Q. In inches, how much would you say the difference was? A. About four and a quarter inches.

Q. In elevation between the two points?

[331] A. Yes, sir.

Q. In how many feet?

A. Eight hundred and forty-six and six-tenths feet.

Q. What is the gauge of that road?

A. Four feet, eight and a half inches—standard gauge.

Q. What is the character of the steel they have on it?

A. They have about seventy-five pound rails.

Q. Do you know where the yard is in Hill's flat?

A. Yes, sir.

Q. Which way from the river is it?

A. South of the river.

Q. In that direction from the river? (Indicating on map.) A. Yes, sir.

Q. Do you know where the town yards are?

A. Yes, sir.

Q. Which way from the Shannon switch?

A. North.

Q. Now, have you another map, Mr. Bond, showing the plan of the main track and of the switch?

A. Yes, sir.

Q. Will you produce that?

(At this point a juror begins to question the witness concerning the map.)

The COURT.—It is improper for the jury to in-

(Testimony of R. C. Bond.)

terrogate the witness unless you get it into the record.

The JUROR.—I wish to know which way the Shannon switch runs—here or here? (Indicating.)

The WITNESS.—It runs back this way—south.
(By Mr. KIBBEY.)

Q. What have you there?

[332] A. A plan of the tracks in the vicinity of the Shannon switch.

Q. Who made that plat?

A. I plotted the notes—took part of them.

Q. Have you made any measurements or are you sufficiently advised as to the map to know whether it is a correct map or not? A. I think it is.

Mr. KIBBEY.—We would like to introduce it in evidence.

Mr. SEABURY.—We make the same objection to it as to the other map.

The COURT.—I overrule the objection.

Mr. SEABURY.—We would like to examine it further before concluding our objections to it.

(Thereupon counsel examines the map.)

Mr. SEABURY.—We have no further objections to urge to it.

The COURT.—It may be received.

(Therefore the map in question is received in evidence and marked by the clerk, Defendants' Exhibit "B.")

(By Mr. KIBBEY.)

Q. Now, will you indicate on that map, Mr. Bond, the Shannon switch?

(Testimony of R. C. Bond.)

A. Yes, sir. The Shannon switch is located right here—the switch point. (Indicating on map.)

Q. Now, take from there, the direction from left or right of the map is the bridge?

A. It is in a southerly direction.

Q. Toward the bridge? A. Yes, sir.

Q. There are three lines there. Which of these, will you [333] please tell the jury, would this represent? (Indicating.)

A. That would indicate the standard and narrow gauge tracks.

Q. Three rails to the track?

A. Yes, sir, three rails.

Q. What is this leading off here where there are only two lines?

A. That is the narrow gauge track off to the side.

Q. This is the Shannon switch? A. Yes, sir.

Q. How far is it from the Shannon switch—that is, the switch point—to the frog?

A. Seventy-four feet.

Q. Will you indicate there where the frog is?

A. It is marked there—"frog point."

Q. Do you know what the angle of departure is?

A. Yes, sir, it is a number nine frog, six degrees and twenty-two minutes angle.

A. Do you know the width of that engine-cab? First, do you know the engine used in switching, known as yard engine? A. Yes, sir.

Q. Do you know the width of that cab?

A. I think ten feet six inches.

Q. Do you know the width of those box-cars?

(Testimony of R. C. Bond.)

A. About nine feet six inches.

Q. Can you state at what point the cab of that engine and the corner of that car would come in collision south of the frog?

Mr. KEARNEY.—We object to the question unless the witness further qualifies by knowing the point.

[334] Mr. KIBBEY.—It is a mathematical matter and he is an engineer.

The COURT.—Is it a matter of computation?

Mr. KIBBEY.—Yes, sir.

The COURT.—The exact place?

Mr. KIBBEY.—Yes, sir, it couldn't meet any place else. It is simply a question of the overhang of the two.

Mr. SEABURY.—The witness has been asked the general question at what point between those tracks the cars would come together.

The COURT.—Do you desire to put a hypothetical question?

Mr. KIBBEY.—No. I have asked him what the angle was; I have asked him what the width of the track and the width of the cars and the width of the engine-cab. Your Honor can just as easily calculate it as I can, but I presume we both would like to have the assistance of someone accustomed to making computations of that kind.

Mr. SEABURY.—We object to it for the reason that no proper foundation has been laid for the introduction of this evidence by this witness.

The COURT.—What do you mean by that?

(Testimony of R. C. Bond.)

Mr. SEABURY.—There is nothing to show the dimensions of the cars to which counsel has reference. The question is general in its character—at what point will cars come together? That must necessarily depend on the width of the two cars that collide. If one car is smaller it would not collide with the larger at the same points that two large cars would collide—that is obvious.

The COURT.—The question assumes the width of both cars, does it not?

[335] Mr. SEABURY.—Yes, but I have proved it.

(By Mr. KIBBEY.)

Q. What is the width of the cab of that engine?

A. About ten feet six.

Q. What is the width of those cars?

A. Nine feet six.

Mr. SEABURY.—Which cars?

(By Mr. KIBBEY.)

Q. Do you know the cars in that collision?

A. I do not—I haven't seen them.

Q. Very well. Suppose they are nine feet six inches, where is the point that they would come in collision?

Mr. SEABURY.—We object to the question as assuming a state of facts not proven.

The COURT.—There has been proof of the width of the car.

Mr. SEABURY.—Of both of the cars.

The COURT.—I think so.

Mr. KIBBEY.—I don't recollect that.

(Testimony of R. C. Bond.)

The COURT.—I am not sure as to the car next to the tender.

Mr. KIBBEY.—There was a general statement as to the car being a stock or box-car.

The COURT.—Some witness testified as to the width of that car—I think it was Mr. Clark.

Mr. McFARLAND.—He said the tender and cars were exactly the same width.

Mr. KIBBEY.—Was there any testimony as to the width of the other car?

The COURT.—That I do not recall.

Mr. SEABURY.—I think the question is objectionable.

Mr. McFARLAND.—We will follow it with the proof that the cars [336] are alike. It is a matter of computation.

The COURT.—You withdraw the question for the present?

Mr. KIBBEY.—Oh, yes.

(To the witness.)

Q. Where is the point of curve, Mr. Bond, from that switch—how far from the switch?

A. Just about at the switch, as near as I can figure it out.

Q. The switch point is distinguished from the frog? A. Yes, sir.

Q. Thence curves in which direction—right or left? A. It curves to the left.

Q. What degree?

A. About a fifteen degree curve.

Q. How far does it maintain that curve?

(Testimony of R. C. Bond.)

A. For about three hundred feet, I should judge—I didn't measure the full length of it.

Mr. KIBBEY.—That is all.

Mr. SEABURY.—I don't think we wish to make any cross-examination of Mr. Bond.

(Witness excused.)

Mr. SEABURY.—I move to strike out the evidence of Mr. Bond on the ground that it is irrelevant and immaterial and not properly connected.

The COURT.—I deny the motion.

Mr. SEABURY.—We except to the ruling of the Court.

[Testimony of J. M. Kline, for Defendant.]

J. M. KLINE, being called as a witness in behalf of the defendant and duly sworn, testifies as follows:

Direct Examination.

(By Mr. McFARLAND.)

[337] Q. What is your name? A. J. M. Kline.

Q. Where do you live? A. At Clifton, Arizona.

Q. What is your business?

A. Engine foreman—switchman.

Q. In whose employ? A. A. & N. M. Railway.

Q. How long have you been employed by that railway company in that capacity?

A. Six years the seventh day of this month.

Q. In what part of the service have you been employed covering that period?

A. Usually most of the time as engine foreman and extra conductor on the road.

Q. What would your duties as engine foreman be?

(Testimony of J. M. Kline.)

A. Well, I have full charge of the engine and over the switchmen.

Q. Is that on the main line of the road or in the yards? A. In the yards.

Q. Then, when I understand you to say you were engine foreman, you mean you were foreman of the engines in the yards of the company? A. Yes, sir.

Q. And those duties didn't extend outside of the yards? A. No, sir.

Q. What comprised the yards of the defendant at Clifton? How far do those yards extend? What are their boundaries or limits?

A. Seven miles out from town is the end of the yard limits.

[338] Q. In which direction?

A. South. And then they go a mile north. And then they extend a half mile or three quarters of a mile kind of southwest—that is, to Shannon.

Q. Is the Shannon smelter within the yard limits?

A. Yes, sir.

Q. Where is Hill's flat in reference to Clifton proper?

A. It is south—just across the San Francisco river.

Q. Where is it from the bridge across the San Francisco river?

A. Well, it starts right in at the south end of the bridge.

Q. Would that be the south or east end?

A. The east, or southeast.

Q. How far does that run from what is known as

(Testimony of J. M. Kline.)

Hill's flat—about?

A. Why, it runs about a third of a mile, I presume.

Q. About a third of a mile. Where were the cars—where did you find the cars that were switched up on to the main line and up on the Shannon switch on the 15th? A. We got them at Hill's flat.

Q. When were they placed there, if you know?

A. The 14th of March, 1911.

Q. Then did they remain there until the morning of the 15th?

A. Yes, sir; about nine fifteen the morning of the 15th.

Q. Did they come there in a train?

A. They did.

Q. Composed of those cars?

Mr. SEABURY.—Every question so far has been leading, and I object to this particular one as leading.

The COURT.—It is leading in form.

[339] (By Mr. McFARLAND.)

Q. How are those cars that you pulled up there on the morning of the 15th in front of the Shannon store brought on to the Hill's flat, do you know?

A. Brought there by a road engine and road crew commonly known as the train crew.

Q. Left there by them? A. Yes, sir.

Q. Is that in the yards?

A. That is as near as I can remember.

Q. That is in the yards of the company?

A. Yes, sir.

(Testimony of J. M. Kline.)

Q. Were there any other cars brought in on that train except the twelve? A. There was.

Q. What was done with those?

A. Switched around to different places in the yard.

Q. On the 14th or 15th?

A. On the morning of the 15th. They had to be switched in order to get these Shannon loads out.

Q. They were in the train that brought in the—they were brought in with the cars that composed that train? A. Yes, sir.

Q. What time was it when you went down to the flat to get those cars?

A. As near as I can remember, about nine o'clock.

Q. Were those cars all together when you went down there?

A. No; we had to make a couple of switches, if I remember.

Q. In order to get those twelve cars?

A. Yes, sir.

[340] Q. After you did that switching and got those twelve cars, what did you do then?

A. We pulled up and left eight on the south side of the crossing—what is known as Shannon crossing—and took four up the Shannon hill.

Q. What did you take them up with?

A. A locomotive.

Q. What was that locomotive engaged in—what were you doing with that locomotive?

A. Switching.

Q. What was the crew that attended that engine

(Testimony of J. M. Kline.)

and those cars? A. I beg pardon?

Q. I say, what was the crew—was it the switching crew or the crew on the main line?

A. It was the switching crew.

Q. Now, you left those cars standing, you say, south of the road— A. Eight of them.

Q. Did you detach four cars from the twelve?

A. We held on to four cars; yes, sir.

Q. And took those four cars up the main line?

A. Yes, sir.

Q. Did you go with them? A. I did.

Q. Did you cut them off? A. I did.

Q. And went up the main line? A. Yes, sir.

Q. Beyond the Shannon switch?

[341] A. Pulled up over Shannon switch.

Q. Then what did you do?

A. Went to Shannon—backed up Shannon.

Q. And delivered them to the Shannon smelter?

A. We didn't deliver them, we just stored them in the Shannon yard up there.

Q. Then what did you do?

A. Came on back. We kicked these cars in at the top of the hill and left switchman Murphy there with them.

Q. Was he one of the switching crew?

A. Yes, sir.

Q. That was the four cars you first took up?

A. Yes, sir; the first four cars.

Q. And you left one switchman up there with them? A. We did.

Q. Who came down with you?

(Testimony of J. M. Kline.)

A. I came down with the engine.

Q. Who else? A. St. Thomas.

Q. And the engineer and fireman?

A. The engineer and fireman, of course.

Q. Did you go back to those eight remaining cars?

A. Yes, sir.

Q. What did you do with them?

A. Pulled them up and left four just to clear the Shannon track.

Q. And the other four?

A. We held on to the other four—uncoupled them and pulled ahead over the Shannon switch.

Q. Who uncoupled? [342] A. I did.

Q. I asked you before that—did you find the eight cars at the same point you left them when you returned? A. Yes, sir.

Q. Hadn't moved at all? A. No, sir.

Q. Were the brakes set? A. No, sir.

Q. Then you personally cut the four cars off from the eight? A. I did.

Q. Were the cars stopped at that time?

A. Yes, sir.

Q. Perfectly still? A. Yes, sir.

Q. How did you cut those cars off?

A. Pulled the pin on them—also broke the air hose.

Q. Was there any air on the freight-cars?

A. No, sir; just the hose was coupled is all.

Q. You pulled the pin and gave the engineer a sign to move on? A. Yes, sir.

Q. Now, how far did you take those cars up the

(Testimony of J. M. Kline.)

main track before you began to back up to the Shannon switch?

A. I couldn't tell the exact distance, but about a car-length or a car and a half.

Q. Who gave the engineer the signal to back up?

A. I gave it to St. Thomas and St. Thomas passed it to the engineer.

Q. Where were you?

A. I was throwing Shannon switch.

Q. Crossing the main line to the switch?

[343] A. I didn't have to cross the main line at all.

Q. You were on that side? A. Yes, sir.

Q. Were you on the four cars at any time that were cut off and carried up—were you on them at any time after you cut them off from the four cars that remained?

A. Was I on the four cars that I left on the main?

Q. No; were you on the four cars that were cut off from those left on the main line?

A. That the engine had hold of?

Q. Yes.

A. Yes, sir; I was on the end—swung on under the end.

Q. How far did you swing on there?

A. Just took hold of the handhold and swung under the edge and rode with my feet caught onto the oil-box.

Q. How far did you ride that way?

A. Three or four car-lengths.

Q. Then you got off? A. I got off at the switch.

(Testimony of J. M. Kline.)

Q. Then where did you go?

A. Threw the switch and jumped across on the other side and caught the cars as they were coming back.

Q. That is, the four cars backing up?

A. The four cars that was pushed by the engine backwards. Yes, sir.

Q. Did you get up on the cars then?

A. I did—climbed up on the cars then.

Q. Which end?

A. The south end and on the west side.

Q. That would be the furtherest car from the engine?

[344] A. Yes, sir; the head car going up the hill.

Q. Were there any other brakemen on the cars?

A. St. Thomas was on the east side on the car next to the engine sitting down.

Q. And you caught the furtherest car from the engine?

A. I was on the south car on the west side.

Q. What was your position on that car?

A. Just as I have stated.

Q. Sitting down or standing up?

A. Had one leg throwed over the end of the car, and the other leg was on the top round before you get to the top of the car—the top handhold.

Q. Was your back to the engineer? A. It was.

Q. Facing south? A. Yes, sir; facing south.

Q. Toward the Shannon switch? A. Yes, sir.

Q. About that time, was your attention called to those cars on the main line, the four cars you left

(Testimony of J. M. Kline.)

remaining? A. I don't understand.

Q. Did you see the cars you left on the main line as you were backing up the Shannon switch?

A. I saw those cars most of the time, only when I was jumping across the main line to catch the cars coming back is about the only time my attention was attracted any other way.

Q. Was there anything particular that attracted your attention to the four cars on the main line?

A. Just as I got to the top of this car—I should say we were about a car or a car-length and a half south of the switch [345] going up Shannon hill, I noticed these cars creeping, and I gave a couple of washout signals and jumped up on top.

Q. To whom did you give the washout signals?

A. To anyone that was there that could see me. I knew that St. Thomas or the fireman would see me—that is, if they were both in their place.

Q. The fireman was in his place? A. Yes, sir.

Q. And St. Thomas was on the next car to the tender?

A. Yes, sir; but he didn't see my signal, so he says.

Q. Did the fireman see it?

A. The fireman did; yes, sir.

Q. Now, what do you mean by a washout signal?

A. I mean if you signal in any shape or form to get them to stop right now, such as this (indicating by waiving hand up and down) with both hands or your hat or glove, or anything like that.

Q. That means stop immediately?

(Testimony of J. M. Kline.)

A. It means do everything possible to stop.

Q. Where were you when you gave that signal?

A. On the end of the car going south.

Q. How far from the switch?

A. About a car and a half south of the switch.

Q. Is there anything in that washout signal that means immediate danger?

A. Yes, sir; that is what is commonly used—danger—man on the track or a cow on the track. That is the only way we have of telegraphing it to the engineer.

Q. I understand you were about a car and a half—that your position at that time was about a car and a half or a car-length south of the switch.

[346] A. Yes, sir.

Q. Where would that place the engine in which Mr. Clark was in charge of?

A. That would place the engine about two cars and a half and the length of the tender north of the switch.

Q. Approximately what distance would that be?

A. Well, it is owing to what length of cars—you mean the cars we had?

Q. Yes.

A. Average about forty feet to the car—that would make it about a hundred and twenty feet, I should judge.

Q. And his engine at the time you gave the washout signal was one hundred and ten feet north of the switch? A. Yes, sir.

Q. Now, what is the distance between the switch

(Testimony of J. M. Kline.)

and the frog? A. Seventy-four feet.

Q. What is the distance between the frog and the point of accident, if you know?

A. Forty-one feet.

Q. South? A. South of the frog.

Q. Then, can you tell us the distance in feet from the point of accident to the point where Mr. Clark's engine was when you gave the washout signal?

A. About a hundred and thirty-five—I mean two hundred and thirty-five feet.

Q. Two hundred and thirty-five feet?

A. Yes, sir.

Q. Would his engine have to go two hundred and thirty-five feet from the point where you gave the signal before it would collide [347] with the cars?

A. That is, where the cars stopped at, yes, sir.

Q. You know where they stopped? A. I do.

Q. You say that is two hundred and twenty-five feet from the place where Mr. Clark's engine was when you gave the signal? A. Yes, sir.

Q. Have you ever had any experience in operating cars? A. I have.

Q. And the distance at which trains could be stopped? A. No, sir, I never made any tests.

Q. Well, you have operated—seen that operation, haven't you? A. Never saw it tested, no, sir.

Q. Did you ever see a train stop?

A. I have, many a one.

Q. Did you ever see a train stop by the application of brakes? A. Hand-brakes or air-brakes?

Q. Air. A. Yes, sir.

(Testimony of J. M. Kline.)

Q. From your knowledge and experience in that line, at what distance would you say an engine and four cars going at the rate of six miles an hour could be stopped by the application of direct air?

Mr. SEABURY.—We object to the question for the reason that there has been no proper foundation laid for the introduction of this evidence, and that the facts of this case have not been properly presented in order that he might give such testimony. The result of the answer would necessarily be dependent upon a variety of circumstances not presented to the witness—such as the weight of the cars, for instance.

[348] The COURT.—Were not similar questions put to witnesses of the plaintiff?

Mr. KEARNEY.—They were on cross-examination.

Mr. McFARLAND.—He said he couldn't stop them inside of five car-lengths.

Mr. SEABURY.—The plaintiff was the engineer and familiar with the distance in which he could stop that particular train in that distance, while this witness says he is not familiar with the tests and doesn't know.

The COURT.—Do you think you are able to answer that question intelligently?

The WITNESS.—Well, I don't know. I have had about twelve years' experience railroading, during half of which time I was a locomotive fireman.

The COURT.—Before he expresses an opinion, he

(Testimony of J. M. Kline.)

must be able to state whether he can answer the question.

Mr. McFARLAND.—I will ask him a preliminary question.

(To the witness.)

Q. During that twelve years' experience you say you were part of the time fireman? A. Yes, sir.

Q. Have you ever seen cars stopped by the application of air?

A. I have—I have stopped them myself.

Q. And know the distance, about, that an engine and four cars could be stopped, going at the rate of approximately six miles an hour?

A. That depends on what kind of brakes you have on your engine.

Q. An engine equipped with air-brakes.

A. Well, there are different classes of air, some of it is bad and some good.

[349] Q. Suppose it is a good engine and well equipped.

A. I would say a man could stop four loads in three car-lengths going six miles an hour.

Q. With that particular engine that was being operated at that time? A. Yes, sir.

Q. Do you know that engine?

A. I am very familiar with it; yes, sir.

Q. Have you ever fired on it?

A. No, sir, I have fired it, but not under pay.

Q. What distance would three car-lengths be of the cars that they were hauling at that time?

A. One hundred and twenty feet.

(Testimony of J. M. Kline.)

Q. One hundred and twenty feet? A. Yes, sir.

Q. Then I understand you to say that if he had applied the air directly at the time he got your signal, he could stop that train and engine in one hundred and twenty feet?

Mr. SEABURY.—We object to the question.

The COURT.—Yes, you are simply asking him as to his opinion—not as to the fact—but his opinion as to what could be done—but not as to whether this particular engine in this particular instance.

(By Mr. McFARLAND.)

Q. What is your opinion as to the distance that engine and those cars could have been stopped by the direct application of straight air going at the rate of six miles an hour?

A. I don't believe I understand your question. Do you mean, what is my opinion regarding that engine stopping four loads going six miles an hour?

[350] Q. Yes.

A. At one hundred and twenty feet, as I said before—three car-lengths.

Q. And I understand you to say it was two hundred and thirty-five feet from the time you gave the signal to the point of collision? A. Yes, sir.

Q. What do I understand you to say your position was in reference to the frog when you gave the wash-out signal?

A. I don't believe I testified to my position regarding the frog.

Q. Your testimony was regarding the switch?

A. Yes, sir.

(Testimony of J. M. Kline.)

Q. How far would that point be from the frog?

A. About fourteen feet.

Q. About fourteen feet? A. Yes, sir.

Q. Well, you would be between the frog and the switch, wouldn't you?

Mr. SEABURY.—We object to the question—we think that is obvious.

(By Mr. McFARLAND.)

Q. Which direction was that fourteen feet from the frog? A. North of the frog.

Q. I mean from the switch.

A. South of the switch.

Q. How far from the switch and in what direction?

A. Sixty feet from the switch and fourteen feet from the frog.

Q. Now, when you gave that washout signal, assuming that [351] the cars were going at the rate of six miles an hour, did you notice any perceptible reduction of speed of that train from the time the signal was given until the collision?

A. No, sir, I didn't take time, I jumped and hollered at my partner, St. Thomas. I thought at first the cars were going to side-swipe each other, which if they had they would have taken both his legs off as he was gazing around the country some place and never seen these cars nor my signal, and I hollered at him three or four times and attracted his attention.

Q. Do I understand you to say there was or was not any perceptible reduction of the speed of the

(Testimony of J. M. Kline.)

train from the time you gave the signal until the collision?

A. I don't recollect any to my knowledge.

Q. Was the steam escaping at that time—the exhaust—was the exhaust working when you hit?

A. Yes, sir.

Q. It was puffing just as it was before?

A. Yes, sir.

Q. Then the steam wasn't shut off?

A. No, sir, she went by a car and a half after they struck.

Q. Would you say it was going at about the same speed when they collided as it was before?

A. Oh, no.

Q. Did you undertake to set any brakes when you gave that washout signal? A. I did.

Q. You set brakes? A. I did.

Q. Did St. Thomas?

[352] A. He got to setting brakes just about the time they stopped, and we tried to hold them from running back down again.

Q. But after the collision the engine passed on south—on by the cars? A. Yes, sir.

Q. How far did it go?

A. About a car-length and a half.

Q. Then did it move back? A. Yes, sir.

Q. And there was another collision as it went back?

A. Yes, sir.

Q. Do you know Mr. Clark? A. I do.

Q. How long have you known him?

A. Well, as near as I can remember, about fifteen

(Testimony of J. M. Kline.)

or sixteen years.

Q. How much of the time during the five years that you have been in the employ of the company have you been engaged in switching down at that point?

A. Well, I don't know the exact time, but I should judge about five years out of the six. I was on the road the rest of the time.

Q. During that five years how many times and how many cars have you known to roll on that track?

A. They crept on me there once before.

Q. Once?

A. Yes, sir, but they stopped of their own accord.

Q. That instance and the one in which the collision occurred are the only times you have ever known them to move? [353] A. Yes, sir.

Q. Had the method of switching and leaving the cars on the main line there always been the same so far as you know? A. Yes, sir.

Q. Left standing on the main line? A. Yes, sir.

Q. Without any brakes and without being chocked or blocked? A. Yes, sir.

Q. And only two instances in five years that you knew of, those cars rolled?

A. That is the only times to my knowledge, yes, sir.

Q. And the other instance one car rolled a few feet and stopped?

A. I didn't say one car. I said some cars crept until the slack all run out of the knuckles and then they stopped of their own accord.

(Testimony of J. M. Kline.)

Q. The same place those cars were standing?

A. No, sir, a little further back.

Q. Are you sufficiently versed in the operation of cars at a place like this one comprising eight hundred and forty-six yards from the bridge to the Shannon switch to say whether cars operated in that way would be a reasonably safe operation?

Mr. SEABURY.—We object to the question—the witness is not qualified to express an opinion on that matter—a matter that is susceptible of proof. It is a conclusion of the witness and one that the jury is only justified in assuming from the facts and not from the witness' opinion as to what is careful and what is not.

The COURT.—Yes; it is asking him in effect to decide the issue here. I sustain the objection.

[354] By Mr. McFARLAND.—To which ruling we except.

(To the witness.)

Q. You say you have known Thomas Clark how long? A. About fifteen or sixteen years.

Q. At Clifton?

A. No, I knew him in the Indian Territory.

Q. How long have you known him in Clifton?

A. A little over twelve years.

Q. Do you know his general reputation as to being a safe and conservative engineer or as to his reputation of being a reckless engineer in the operation of his engine?

Mr. SEABURY.—We object—it is clearly incompetent and inadmissible.

(Testimony of J. M. Kline.)

The COURT.—I sustain the objection.

Mr. McFARLAND.—We except to the ruling of the Court.

(To the witness.)

Q. Do you know whether his methods and mode of operating his engine is of a safe and conservative character—I withdraw that—whether his mode of operating his engine in the yards of this company in switching cars is careful, or whether his method and mode of operating his engine in switching cars in the yards of the company is reckless and careless?

Mr. SEABURY.—We make the same objection, and we further object to the repeated offer of evidence which counsel must know to be incompetent, *sole* for the purpose of putting such inferences into the jury's mind—that constitutes reversible error.

Mr. KIBBEY.—We think that that statement is entirely uncalled for—we think this is competent evidence.

Mr. SEABURY.—We can't conceive of that being competent evidence.

[355] The COURT.—Upon what theory do you think it is competent?

Mr. McFARLAND.—On his method and mode of operating his engine—he said he was careful.

The COURT.—Careful in that particular instance?

Mr. McFARLAND.—Generally.

The COURT.—I don't recollect that he was asked as to that.

Mr. McFARLAND.—That goes to the question as to whether he was a careful, painstaking operator

(Testimony of J. M. Kline.)

with his engine, or whether he was a careless and reckless man.

The COURT.—Suppose he was careless and reckless—you seek to establish something from which it may be inferred that he was careless and reckless in this particular instance?

Mr. McFARLAND.—Yes, sir; a fact from which the jury may infer whether this was careless and reckless or not.

Mr. BENNETT.—It seems to me the evidence is admissible in this view of the matter; Mr. Clark testified, as also did Mr. Chambers, the fireman, that immediately on receiving the washout signal he shut off the steam and applied the air. The witness now on the stand testified that it was impossible for him to testify that that was true, but he did testify that the exhaust was working when the engine reached the place of collision, which, if true, contradicts the statement of Mr. Clark that he shut off the steam. Now, in order, then, that the jury may determine which of these facts are true, the usual, habitual conduct of Mr. Clark in the operation of his engine or his usual and habitual manner of operating his engine in such yards would be illustrative and would enable the jury to determine which would be the most likely to be true.

The COURT.—Possibly if this witness knows of instances of carelessness that might go to the jury, but I doubt whether his opinion [356] as to whether he is a safe operator is competent evidence. I don't know of any instance where one workman was

(Testimony of J. M. Kline.)

permitted to state his opinion as to whether the other fellow was a safe workman or not, or whether he had that reputation or not, unless that be the issue, as, for instance, whether the employer was negligent in hiring him or suffering him to work so as to injure the lives of other workmen; but as establishing whether in a particular instance a workman is careless or otherwise, I know of no instance where proof of general reputation of that is admissible.

Mr. BENNETT.—Possibly not general reputation, but I understand he worked with Mr. Clark in the same switching crew and that he did know of his usual and general conduct in reference to switching and handling his engine.

The COURT.—I should think as far as the matter could go in that way would be to admit proof of instances of like omissions to take the ordinary methods of caution, but not his impression—not his opinion—as to that matter.

By Mr. McFARLAND.—Note our exception.

(To the witness.)

Q. Do you know of Mr. Clark's habits—I withdraw that. Do you know whether as a general rule Mr. Clark obeyed signals or whether he ignored signals?

Mr. SEABURY.—We object to the question as incompetent, irrelevant and immaterial.

The COURT.—I think the objection is equally good to that question.

Mr. McFARLAND.—We except.

(To the witness.)

(Testimony of J. M. Kline.)

Q. Do you know of instances where Mr. Clark disobeyed signals?

[357] Mr. SEABURY.—We object to that question also. The issue here is not whether Mr. Clark was careless about obeying signals.

The COURT.—Suppose the evidence be conflicting on that point? Suppose, assuming that the evidence indicates—the evidence put in by the defendant here indicates—that he didn't respond promptly to the signal to stop or didn't cut off the steam. Now, there is an issue of fact. Would it not, under the circumstances, be competent to show that in other instances the defendant was likewise slow to respond to the signal, or careless?

Mr. SEABURY.—We think not. Assume for the sake of argument that he was careless—careless on other occasions—yet on the occasion of the injury he might have been proceeding with care.

The COURT.—Would it lend anything to the probability of the case?

Mr. SEABURY.—We think not, and contend it is absolutely incompetent to receive such evidence, even assuming that they have it to produce, which we do not concede.

The COURT.—The individual element—the human element—is a factor in all these matters—some men are slow or quick to respond to signals of danger. Now, how is the jury to determine which of these contributing theories of fact is the true one unless they have all the light that can be thrown on that including the individual factor?

(Testimony of J. M. Kline.)

Mr. SEABURY.—We want them to have all the light that can be thrown upon the issue here. We say all that light comes from the evidence of these witnesses as to what took place on this occasion, and that can be the only test.

The COURT.—But suppose those witnesses are sharply conflicting?

Mr. SEABURY.—Then it is for the jury to determine.

The COURT.—Then may they not consider which the more probable theory?

[358] Mr. SEABURY.—That may be true, but we say they may not consider which is more probable if it is based on evidence which is not competent *because does* not relate to the matter involved.

The COURT.—But Mr. Clark was there—he was the actor in the matter. Suppose his hearing or sight was bad and sharp hearing or sight had something to do with his conduct, would it not be admissible to show his defective hearing or acuteness of *sight* or defective sight or acuteness of sight as the case may be?

Mr. SEABURY.—We think not, and we say further in answer to that that if he had any defective sight or hearing it was the duty of the defendant to discover it.

Mr. KIBBEY.—He can't complain of that.

The COURT.—This evidence is only admissible on the theory that it shows contributory negligence.

(Thereupon the question is argued further to the Court, the further argument not being taken down by the reporter.)

(Testimony of J. M. Kline.)

Mr. SEABURY.—There is another ground of objection. Any question however framed, calling for other acts, practically asks the witness to state whether he exercised care on those occasions or not—the question is practically did he exercise care on other occasions.

The COURT.—I am in doubt about it. The objection will be sustained. I think it is safer.

Mr. McFARLAND.—We except. Now, I desire to put the question a little more definitely so as to get it into the record in better shape.

The COURT.—You may do so.

(By Mr. McFARLAND.)

Q. Do you know of any instances on other occasions previous [359] to this accident where Mr. Clark failed or refused to obey signals given him?

Mr. SEABURY.—We make the same objection.

The COURT.—The objection is sustained.

Mr. KIBBEY.—May we, in order to preserve our exception, state what we desire to prove?

The COURT.—I think it is already apparent. The argument has developed that.

Mr. McFARLAND.—If there is any doubt about it we would like to state it.

Mr. SEABURY.—We object to the statement of what they desire to prove, and ask that counsel put their question to the witness. I shall object to any offer made for the purpose of a bill of exceptions.

The COURT.—I think this conference is absolutely unnecessary. I think if a bill of exceptions is necessary to be prepared in this case the Court can

(Testimony of J. M. Kline.)

find upon the record here enough without stating—repeating the statements—to put into the bill of exceptions to indicate the purpose of the offer. That is all you desire.

Mr. McFARLAND.—In one case decided by the Supreme Court, the Court refused to consider the matter for the reason that the offer was not made. That is in the case of the Territory vs. Creardon.

The COURT.—You mean it was not stated that the witness would answer the question.

Mr. McFARLAND.—They didn't state what they offered to prove by that witness, and therefore the Court wouldn't consider it. It might be that the Supreme Court of the United States might be governed by decisions of the local court on these questions.

[360] The COURT.—Of course the Court couldn't say by bill of exceptions that the witness would testify—

Mr. KIBBEY.—No, but that we offered to prove by the witness, so and so.

The COURT.—Now you may proceed.

(By Mr. McFARLAND.)

Q. Has not Mr. Clark, during your knowledge of him while he was operating the switch engine in the yards of the defendant company, uniformly refused and declined to obey signals given him?

Mr. SEABURY.—We object to the question on the ground already urged and further that it has been asked and answered repeatedly.

The COURT.—I sustain the objection.

(Testimony of J. M. Kline.)

(By Mr. McFARLAND.)

Q. Are there not numberless instances that you know of personally where he has refused or neglected to obey signals given him while operating the switch engine in the yards of the defendant at Clifton?

Mr. SEABURY.—We make the same objection.

The COURT.—I sustain the objection.

Mr. SEABURY.—And I ask your Honor to instruct the jury at this time that they must disregard these questions asked by counsel, and that they must not assume that the answer would be favorable to the defendant if allowed to be answered.

The COURT.—That is true, and I assume the jury will understand that fact, that nothing implied in a question that is ruled out to be improper is to be considered by the jury as any sort of evidence. Now, then, you may proceed.

(By Mr. McFARLAND.)

Q. You say you have had quite a lot of experience in operating [361] trains and in switching cars?

A. I have.

Q. How many brakemen are usually required on four cars attached to an engine—switching four cars attached to an engine?

A. How many brakemen are required?

Q. Yes.

A. That is owing to where them cars is going.

Q. In switching cars.

A. Brakemen don't switch them.

Q. I mean when the engineer or engine is switching them.

(Testimony of J. M. Kline.)

A. You mean how many switchmen are required?

Q. Yes.

A. Some places they have more men to a crew than other places. We have three—four.

Q. How many are necessary at that time and place in switching up those four cars up that hill?

A. How many is necessary?

Q. Yes.

A. Why it could have been one or it could have been two—two of us was there.

Q. Is that all that was necessary to conduct the business of switching those cars as brakemen?

A. Yes, sir, we have went up there lots of times with only one man.

Q. You consider one man sufficient?

A. If he can get to see the engine crew and also throw switches.

Q. During the five years that you have been connected with the defendant at Clifton, have you ever known of an accident or anyone [362] killed as a result of switching cars as done by the defendant?

Mr. SEABURY.—We object. The question is entirely irrelevant.

The COURT.—Is that to meet the evidence that came in as to the two men killed?

Mr. McFARLAND.—Yes, sir.

The COURT.—I will admit it on that ground.

(By Mr. McFARLAND.)

Q. Was there ever an accident to one or more as the result of switching cars as was done on that track and up that Shannon switch during your connection

(Testimony of J. M. Kline.)

with the railway in the past five years?

Mr. SEABURY.—We object to the question on the ground already urged, and on the further ground that it is improper in form and calls for a conclusion of the witness.

The COURT.—I overrule the objection.

The WITNESS.—There was two men killed there by the narrow gauge ore train once.

(By Mr. McFARLAND.)

Q. But not by the defendant's trains?

A. No, sir.

Q. Was anybody ever killed at or near that place by the defendant's trains?

A. We never have killed but one man in that yard there, and that was after this accident happened.

Q. I mean at this place in switching cars.

A. No.

Q. Never was an accident there?

A. There was two accidents there but not with our crew.

Q. With a different crew? A. Yes, sir.

[363] Q. And not on the tracks of the defendant?

A. No, sir.

Q. But up on the Shannon switch? A. Yes, sir.

Mr. SEABURY.—We object to this testimony and ask that it be stricken out.

The COURT.—I think this is proper. There was a very damaging statement that went in I think by the witness Thompson—

Mr. KIBBEY.—No, Chambers—

The COURT.— —saying they had already killed

(Testimony of J. M. Kline.)

a man or two at that point, and I think it is fair the defendant should meet that.

(By Mr. McFARLAND.)

Q. Who were those people killed on the Shannon switch by the yard train?

A. There was only one killed down by the switches and another one about one hundred yards south of the switch.

Q. On what line? A. On the Shannon.

Q. Who were they? A. Both Mexicans.

Q. How were they killed?

A. Run over by a train.

Q. Do you know the circumstances?

A. One was drunk and walked in front of the train, and the other one was pulling a pin and the cars parted and he fell down between them. He had one foot on one car and one foot on the other pulling pins.

Q. That was not on any of the defendant's trains?

A. No, sir.

[364] Q. And not on the main line of the defendant?

A. The engine and the cars and the men were under the Coronado Railway's jurisdiction, but they were hauling Shannon ore at that time.

Q. Narrow gauge or broad gauge?

A. Narrow gauge.

Q. But I understand you to say that there never has been any accident or anyone killed on the road of the defendant by reason of the operation of their trains at that point as they were operated in switching.

(Testimony of J. M. Kline.)

A. No one ever hurt as I remember of or know of.

Q. Did you see Mr. Clark after the accident?

A. Yes, sir.

Q. How long after it was it before you saw him?

A. Oh, I should judge five or ten minutes. I helped carry him down to the Shannon crossing.

Q. On the engine?

A. From where he got off the engine, yes, sir.

Q. Did you notice his condition when you first saw him at the engine?

A. I asked him if he was hurt and he said he was—said his side hurt him and his hip hurt him.

Q. Was that the extent of the injuries?

A. That is all I remember of. His face was very dirty.

Q. Was there any blood on his face?

A. Not that I remember of.

Q. Any blood in the neighborhood of his eye?

A. I never saw any blood whatever.

Q. Any blood whatever on his face? A. No, sir.

[365] Q. Quite positive about that?

A. As near as I can remember. I saw his face. It was dirty—coal dust all over it.

Q. That was the extent of his complaint that you have stated?

A. I asked him if he was hurt and he said he was, that his hips hurt him and that his sides hurt him. So Gatti and I made a saddle out of our hands and let him put his arms around our necks and carried him to the road crossing and he said, "Let me down; I think I can make it all right." He said, "I don't

(Testimony of J. M. Kline.)

want to go home with you fellows carrying me. It will make my wife faint—make her sick.” So I quit them at the crossing and I think that Mr. Gatti accompanied him down to his steps down to the yard.

Q. Did you see a party at the engine that day by the name of Jeff Dunagan?

A. Not that I remember.

Q. You have no recollection of seeing him there?

A. No, sir.

Q. Was Kelley there?

A. Kelley came there after the accident.

Q. Do you know where he was before?

A. I do not.

Q. Did you see Mr. Clark after that?

A. After the accident?

Q. Yes. A. Oh, yes, a number of times.

Q. Did he say anything about his condition?

A. I usually asked him how he was feeling and he would say his side was bothering him, “I didn’t rest very well last night.” Talked to me something like that. He told me about having his [366] ribs broken.

Q. Did he ever say anything to you about any injury to his head? A. No, sir.

Q. Did he complain of his head at the time of the accident? A. Not to me.

Q. Did he complain of it to anybody else in your presence? A. No, sir.

Q. You have described in a general way the causes that he complained of? So far as you remember?

A. Yes, sir.

(Testimony of J. M. Kline.)

Q. You don't remember of any other at the present time except as you have stated? A. No, sir.

The COURT.—We will take a recess at this point. Bear in mind the admonition of the Court about talking to anyone about this case, and be here to-morrow at half-past nine.

Thereupon the witness leaves the stand and the Court takes a recess.

Friday, November 15th, 1912.

At nine-thirty A. M. this day, the plaintiff being present in person and represented by counsel, and the defendant being represented by counsel, the jurors come into court and are called by the clerk, all answering to their names, and thereupon the following further proceedings are had herein, to wit:

J. M. KLINE, the witness on the stand at the closing of court on November 14th, is again called to the stand to testify on behalf of the defendant, and having been heretofore duly sworn in this case, testifies further as follows:

Direct Examination Continued.

[367] Mr. McFARLAND.—If the Court please, since adjournment of court yesterday, we have given some thought to the question as to the proper procedure in cases where the objection to a question is sustained, whether as a legal proposition under the practice in the territory it would be proper for us to follow up that question by making an offer. We find that the rule in the Supreme Court of the United States, which possibly may be the court of last resort in this case, has held that the rules and decisions of

(Testimony of J. M. Kline.)

the courts of last resort in the State from which the case comes will be controlling on that court. And in view of the further fact that the Supreme Court of this Territory has held in a case in which your Honor wrote the opinion—Territory vs. Fraley—that the Court would not consider that question unless the offer was made, we have decided that that being the proper practice, we now desire to make the offer.

The COURT.—The offer of proof?

Mr. McFARLAND.—We propose to prove by this witness in answer to the question that the objection was sustained to—

The COURT.—I don't remember what the question was now.

Mr. McFARLAND.—As to prior acts of negligence in respect to the operation of his engine in the switching of cars in obedience to signals. And now we propose to make that offer.

Mr. SEABURY.—I desire to object to the offer of proof in this connection, if your Honor please, upon the ground that the witness on the stand has been interrogated fully with reference to it and ample foundation laid for the purpose of the rulings of the Court upon those questions, and there can be no necessity or occasion for any further offer of proof in that connection.

The COURT.—I doubt if the Court can decline to permit [368] counsel to make any kind of offer.

Mr. SEABURY.—I ask that counsel be directed to proceed with his examination of the witness, if

(Testimony of J. M. Kline.)

his offer relates to what he intends to prove by this witness. The matter is entirely within the discretion of the trial court either to accept the offer or have the question put.

The COURT.—The Court should allow counsel the fullest opportunity to preserve the record.

Mr. SEABURY.—Unquestionably, and I offer no opposition to it at all. I will stipulate now, if your Honor will permit, that in the event of the bill of exceptions being presented to the Court by defendant for the purpose of reviewing the question whether or not the defendant may now offer evidence of prior acts of negligence on the part of the plaintiff in connection with this matter, I will consent it may go into the bill of exceptions as if the offer had been fully made at length.

The COURT.—I think what counsel has reference to is not only the offer but the statement that the evidence would be elicited from the witness—that it would come from the witness. Under the rule an offer is of no avail unless it is followed with the statement that witness would answer, if permitted to be interrogated upon that point, in a particular way.

Mr. SEABURY.—My understanding is that where there is nothing to impugn the good faith of the offer, the offer is made without further assurance that the witness would so testify if permitted to answer.

The COURT.—The rule varies.

Mr. SEABURY.—Of course I can't stipulate the

(Testimony of J. M. Kline.)

witness would so answer, because I don't think he would, and the purpose of my objection is to exclude it.

[369] The COURT.—I thought he had complied with the rule.

Mr. KIBBEY.—May we not make our offer in writing to the Court?

Mr. SEABURY.—Yes, indeed. I have no objection to that.

The COURT.—Then it may be done at any time later on, I presume. Are you through with this witness, Mr. McFarland?

Mr. McFARLAND.—Does the Court say that that can be made at any time?

The COURT.—Yes, before the evidence closes.

Mr. McFARLAND.—The only objection I have to that—

The COURT.—Judge, you are taking up so much time in this matter. If that arrangement is not satisfactory, of course we will have to proceed in some other way.

Mr. McFARLAND.—We have no complaint to make of the Court as to its action—we will endeavor to confine ourselves to the question.

The COURT.—That was a suggestion of Judge Kibbey's and I thought it was reasonable.

(By Mr. McFARLAND.)

Q. Mr. Kline, you are familiar with the main line of the defendant's road near what is known as the San Francisco bridge to the Shannon switch?

A. Yes, sir.

(Testimony of J. M. Kline.)

Q. How often have you been over that road?

A. I have been over it a many a time—four or five times a day for five years.

Q. Have you been engaged in the operation of switching cars on that part of the line for that length of time?

Mr. SEABURY.—He testified fully as to that—

Mr. McFARLAND.—This is a preliminary question.

[370] The WITNESS.—Yes, sir, I have been engaged there.

(By Mr. McFARLAND.)

Q. You know the grade of that part of the road?

A. Well, I couldn't say the exact grade.

Q. And I understand you to say you have had experience in the operation of cars and the switching of cars?

A. Yes, sir.

Q. Now, from that experience and knowledge of the operation of cars on that part of the defendant's railway, would you say that it would be a reasonably safe operation to permit cars to remain upon that part of the track without brakes being set or otherwise blocked or chocked?

Mr. SEABURY.—We object to the question. We think in view of the condition of the evidence in this case the question is incompetent, and the witness is invited to determine the matter before the jury.

The COURT.—I think that precise matter was ruled on before.

Mr. McFARLAND.—This is as to the same operation.

(Testimony of J. M. Kline.)

The COURT.—You are asking him his opinion as to whether that is safe or unsafe.

Mr. McFARLAND.—It is the same operation in switching cars on that part of the defendant's roadway. I say that because other witnesses have testified for the plaintiff that he was exercising care and was a reasonably prudent man, and that the cars would not stand upon that track without being secured in some way, and the vital question in this case as I understand it is whether they would stand or not.

The COURT.—Are you asking the witness to decide that matter?

Mr. McFARLAND.—I am asking him as a fact.

[371] The COURT.—It is necessarily a matter of opinion as to whether it is safe or unsafe. He may state what he knows as to the condition of the track and whether cars will stand without a brake and all that. But I think he has already testified as to that.

Mr. McFARLAND.—On that fact?

The COURT.—I think so.

Mr. McFARLAND.—May I ask him again?

The COURT.—Yes.

(By Mr. McFARLAND.)

Q. You say you are familiar with that track?

A. I am.

Q. And the operation of cars over it?

A. Yes, sir.

Q. Would cars ordinarily stand upon that track without brakes being set or otherwise secured?

A. They would.

Q. Now, as a result of your experience in the

(Testimony of J. M. Kline.)

operation of cars on that part of the line, didn't they almost uniformly stand without brakes?

Mr. SEABURY.—We object to the question—to the qualification—making the witness testify as to how frequently the cars remained in that position. Also on the ground that it is leading. Also that the witness has already answered the question fully.

The COURT.—The objection is sustained on the ground that it is leading.

Mr. McFARLAND.—Q. Did cars remain on that portion of the defendant's railway without brakes being set?

[372] Mr. KEARNEY.—We object to the question as leading.

The COURT.—He has already stated that fully—that the only occasions on which he knew of cars moving were this time and another time.

Mr. McFARLAND.—That is all.

Cross-examination.

(By Mr. SEABURY.)

Q. Mr. Kline, you say that cars would remain at this position of the track; isn't that dependent upon a variety of circumstances? A. No, sir.

Q. It is not? A. No, sir.

Q. It doesn't depend on the number of cars?

A. It doesn't.

Q. It doesn't depend upon whether the season of the year is summer or winter?

A. Cars will not roll in winter as easily as they do in summer.

Q. So it does depend in a measure on a variety of

(Testimony of J. M. Kline.)

circumstances, one among them that the season of the year is winter, for example.

A. That would have a tendency to freeze the wheels closer.

Q. Those cars would have a tendency not to roll early in the morning? A. Yes, sir.

Q. Would it make a difference whether cars had been recently moved from another position whether they would readily move on that incline or not?

A. No, sir, not in this country.

Q. Would a question of wind have anything to do with it?

[373] A. Owing to how strong the wind would be.

Q. So if the wind was sufficiently strong and blowing in a northerly direction, it might start the cars standing there without brakes, rolling, might it not?

A. They would have to be on a heavy grade and there would have to be a heavy wind.

Q. I am speaking about that particular grade.

A. No, sir, no wind would blow them cars.

Q. Is there a single or double track there on the main line?

A. There are three rails for a distance—that is, narrow gauge and wide gauge.

Q. Do other cars pass the main track on which those cars in question were on the 15th of March, 1911?

A. Did cars pass those cars left on the main?

Q. No—do cars pass on the other track—may cars pass on the other track?

(Testimony of J. M. Kline.)

A. I don't understand that question.

Q. All right, I will put it so you will. You say there are three tracks there— A. Three rails.

Q. I am asking whether it is a single track.

A. It is known as a single track.

Q. Containing three rails? A. Yes, sir.

Q. So there is no other track alongside of it on which cars will run?

A. No. That track can be used by a narrow gauge or a wide gauge, that is the only way.

Q. I don't recollect whether there was a double track [374] there or not. I see in this photograph, Plaintiff's Exhibit One, that there appears to be a freight-car north of the crossing and between the Shannon switch. I show you, Mr. Kline, and call your attention to the position of that freight-car there. (Exhibiting photograph to witness.)

A. That is not a freight-car, that is a narrow gauge ore-car sitting on the spur between the Shannon switch and the main line. You see here is the switch leading off. (Indicating.)

Q. That car could come north of the Shannon switch, could it not?

A. Oh, yes, it would go up here and up in the upper yards.

Q. Now, I ask you if there were four cars standing on the main line in the position in which these last four cars were that rolled of their own motion and if that ore-car was run up on the west side of the cars that moved and continued on down to the Shannon switch, would you say that it would be possible

(Testimony of J. M. Kline.)

for those cars to start rolling—the cars on the main track—if the cars on the main track didn't have any brakes set and were not blocked?

A. It is possible—it is owing to circumstances.

Q. Yes. Now, another thing: if there were any brakemen on the car that remained and they jumped on the cars, or if the cars received any jolt, that might start them? A. Yes, sir.

Q. So that when you told me in the first instance that substantially that the car would not move ordinarily, you meant that it was subject to these various circumstances we have just discussed?

A. Oh, yes, I didn't fully understand your question in regard to cars not moving at all.

[375] Q. Now, you say, as I understand you, that this engine operated by Mr. Clark was not stopped for about two hundred and thirty-five feet from the time you gave the signal to the time of the collision; is that your recollection?

A. I don't believe I stated the engine didn't stop in 235 feet.

Q. What did you state about 235 feet?

A. I stated from the time I gave my signal to where his engine was and to where the collision happened was about 235 feet.

Q. Now, at the time you gave the signal your car was backing up the switch?

A. Yes, sir, about a car and a half south of the switch.

Q. And consequently your position was changing every instant? A. We were moving, yes, sir.

(Testimony of J. M. Kline.)

Q. I don't quite get the estimate of 235 feet. Will you explain a little more fully?

A. As I stated, when I gave the signal I was about a car and a half south of the switch, which would make it about sixty feet south of the switch, so that left about two car-lengths and a half and the tender from me on the north side of the switch—and would make it a hundred and twenty feet.

Q. Now, tell us what the position of the engine was when it stopped, if you know.

A. The engine when it stopped was a car and a half south of where they side-swiped.

Q. Was it entirely past the switch?

A. Oh, yes.

Q. Had it entirely passed the frog?

[376] A. Yes, sir.

Q. Can you say within what space the engine stopped from the time you gave the signal? Within what space did it stop?

A. I couldn't say; that would be a guess.

Q. Now, Mr. Kline, you said you had never operated this engine, didn't you?

A. No, sir, I did not.

Q. Have you operated that engine?

A. I have.

Q. You have never tested within what space it could stop, though, have you?

A. Well, only just pulling up to a switch and trying it with a light engine.

Q. Mr. McFarland asked you those questions and you said you never made any test or had been present

(Testimony of J. M. Kline.)

when a test was made. A. No, sir.

Q. You know that Clark has been in the business of railroad engineer for many years?

A. Yes, sir, I think he has been in the railroad business about forty years.

Q. Do you know that he has been connected with the road for approximately thirteen years before this accident?

A. Well, he has been connected with it ever since I have been there—about twelve years.

Q. How old are you? A. I am twenty-eight.

Q. Do you know how old Mr. Clark is?

A. Why, I couldn't say for certain, but I think he is about sixty-seven years old.

[377] Q. Now, do you mean to tell this jury that you know more about stopping this engine than he does? A. I do not.

Q. You don't mean to say that, do you?

A. No, sir.

Q. Now, Mr. Kline, you were foreman in that yard, were you not? A. I was.

Q. St. Thomas was under your direction, was he not? A. He was.

Q. Kelley was over you? A. Yes, sir.

Q. Was Kelley in the yard at the time this occurred in March, 1911? A. In the yard?

Q. Yes.

A. I couldn't say where Kelley was.

Q. He wasn't in sight of this transaction?

A. Not until after it happened.

Q. That is what I mean.

(Testimony of J. M. Kline.)

A. That is, not that I know of. I didn't see him until after the accident.

Q. About how far away did you say those moving cars were when you first gave the washout signal?

Mr. BENNETT.—How far away from what?
(By Mr. SEABURY.)

Q. From the moving cars.

A. How far I was away from the cars that was moving?

Q. How far away were the cars that were moving down the main track from you at the time you first saw them moving?

[378] A. I don't think they had gone more than five or six feet. They had just started to creep.

Q. They had just begun to creep? A. Yes, sir.

Q. Can't you estimate the distance they were from you at the time you saw them moving?

A. Well, I should judge that they were about seventy feet from the car that I was on.

Q. About seventy feet from your car?

A. Yes, sir.

Q. Now, as I understand you, the instant that you saw those cars moving you immediately gave the washout signal. A. Yes, sir.

Q. That signal was given by you to be received by one of two men? A. Yes, sir.

Q. Either St. Thomas or Chambers?

A. Yes, sir.

Q. Now, as I understand you, at the time you gave the signal, St. Thomas was gazing around the country? A. He was.

(Testimony of J. M. Kline.)

Q. What part of the country?

A. That is, I can't say he was right at the time I gave the signal, but when I ran up and went for the brake he was not looking at me.

Q. He was still sitting still?

A. Yes, sir. I had to holler to attract his attention. I thought the cars were going to side-swipe the cars he was on, and if they had it would have cut off the legs.

Q. If he had paid attention he would have received your [379] signal?

A. He might have seen my signal and passed it to the engineer and then been looking around at some place else.

Q. Do you think it likely that St. Thomas would receive a washout signal—a highly dangerous signal—and then after transmitting it to the fireman he would resume gazing around the country?

A. It might be possible.

Q. Now, you have worked with St. Thomas have you not? A. Yes, sir.

Q. Let's have the best opinion you can give as to whether it is probable St. Thomas would resume gazing around the country after getting a washout signal.

A. That is my best opinion. He might have after he gave my signal to the engineer.

Q. At any rate, Mr. Kline, as I understand you, then you don't say St. Thomas didn't get the signal?

A. I do not.

Q. How many signals did you make?

A. Two, if I remember right.

(Testimony of J. M. Kline.)

Q. How far apart were they?

A. Just as fast as I could raise my arms.

Q. Just as fast as you gave one you repeated it?

A. Yes, sir.

Q. Do you mean to say that if St. Thomas hadn't been looking around the country, as you describe it, that he would have acted any more promptly than he did in response to your signal?

A. No, sir, I don't. He did all he possibly could if he got the signal and passed it to the engineer, unless he wanted to jump off.

[380] Q. But he didn't jump off? A. No, sir.

Q. He stayed with it? A. Yes, sir.

Q. And so did Mr. Chambers?

A. So far as I know; I didn't see any more in the engine—I ran for the brake, is all.

Mr. SEABURY.—That is all.

Redirect Examination.

(By Mr. KIBBEY.)

Q. The fireman could see you?

A. He is the only man on the engine that could see me.

Q. By reason of being around the curve?

A. Yes, sir.

Q. You could see the fireman?

A. I could if I looked for him.

Q. You could look right into the cab?

A. Yes, sir.

Q. Nothing to obstruct the view between yourself and the fireman? A. Nothing whatever.

Mr. KIBBEY.—That is all.

(Witness excused.)

[Testimony of J. T. Kelley, for Defendant.]

J. T. KELLEY, being called as a witness in behalf of the defendant and duly sworn, is excused from the witness-stand temporarily.

Mr. McFARLAND.—If the Court please, before examining this witness I would like to ask Mr. Thompson just one question.

**[Testimony of A. T. Thompson, for Defendant
(Recalled).]**

A. T. THOMPSON, being recalled as a witness in behalf of the defendant, and having been heretofore duly sworn in this [381] case, testifies further as follows:

Direct Examination.

(By Mr. McFARLAND.)

Q. What is your business, Mr. Thompson?

A. I am general manager of the Detroit Copper Mining Company.

Q. You are not now connected with the Arizona and New Mexico Railway Company? A. No, sir.

Q. As an officer? A. No, sir.

Q. Or in any capacity? A. No, sir.

Q. When did you sever your connection with that company? A. In July of this year.

(Witness excused.)

**[Testimony of J. T. Kelley, for Defendant
(Recalled).]**

J. T. KELLEY, being recalled as a witness in behalf of the defendant and having been heretofore duly sworn in this case, but not examined, testifies as follows:

(Testimony of J. T. Kelley.)

Direct Examination.

(By Mr. McFARLAND.)

Q. Please give your name to the reporter, Mr. Kelley. A. J. T. Kelley.

Q. Where do you live?

A. At Clifton, Arizona.

Q. How long have you lived there?

A. Thirteen years, a little better.

Q. What is your business?

A. Yardmaster for the A. & N. M. Railway at Clifton.

Q. How long have you been in the employ of the company in that capacity?

[382] A. Some four or five years.

Q. In what capacity did you serve the company previous to that time, if any?

A. Brakeman, switchman and conductor.

Q. Do you know Henry Doran? A. Yes, sir.

Q. How long have you known him?

A. Why, I have known Mr. Doran ever since he came to Clifton, I believe; I don't know how long that is, though.

Q. Did you hear the testimony of Mr. Doran when he was on the stand? A. Yes, sir.

Q. As a witness in this case?

A. Yes, sir.

Q. And particularly in reference to a conversation with you? A. Yes, sir.

Q. State whether or not you ever had such a conversation with him. A. I did not.

Q. He testified that he told you about the danger-

(Testimony of J. T. Kelley.)

ous condition of this track by leaving cars there without brakes being set. Did you ever have any conversation with him on that subject? A. No, sir.

Q. At that time? A. No, sir.

Q. Or at any other time?

A. Or at any other time.

Q. Did you ever tell him you would not have the brakes set? A. No, sir, I did not.

[383] Q. You are familiar with that track?

A. Yes, sir.

Q. Are you familiar with the operation of trains?

A. Well, I have had what experience I have had in Clifton in the operating of trains. I claim I am familiar with the way they should be operated around there.

Q. You have been familiar with the operation of the switch engine and switching crews around that part of the track, how many years?

A. I have been over that track now, off and on, for nine years. I have been in charge of the switch engine as yardmaster there for better than five years now.

Q. Do you know whether freight-cars left upon that part of the track between the San Francisco river and the Shannon switch would remain standing without the brakes being set? A. I do.

Q. How long have you known of cars remaining on that part of the track standing without brakes being set?

A. How long have I known it at one time?

Q. How long have you known during that time?

(Testimony of J. T. Kelley.)

A. Every day we would have more than one drag of cars to take up the Shannon hill. If we had more than one trip to make we would leave some of them on the main line. That would happen nearly every day whenever we had more than one trip up.

Q. Would you switch cars up the Shannon switch every day?

A. Well, every day there was any cars in there for us to switch to Shannon; yes, sir.

Q. And what would the probable average of cars switched up there daily be?

[384] A. Well, day in and day out, probably twelve or fourteen cars a day, up to eighteen or twenty, and down as low as four or five.

Q. During all that time cars were left standing on that part of the track?

A. Any time that I have been with cars and doing the work there I have always left them on that track up to that time.

Q. During that five years do you know of any instances where a car did in fact move?

A. I never saw a car move there only by power—locomotive power.

Q. Did you see Mr. Clark on the day of the accident? A. Yes, sir.

Q. How long after? Were you there when the accident occurred?

A. No, sir, not present when the accident occurred.

Q. Where were you?

A. Between the depot and the point of the accident.

(Testimony of J. T. Kelley.)

Q. From what point did you come?

A. I was coming south through the yards from the depot.

Q. Did you see him?

A. I saw him after the accident.

Q. How long after the accident?

A. I wouldn't say—probably a minute or a minute and a half or two minutes, how long it would take me to get from where I was to where he was.

Q. Did you see the accident? A. No, sir.

Q. You were not where it was visible to you?

A. No, sir. I couldn't see from where I was where the accident happened.

[385] Q. Where was he when you first saw him?

A. Mr. Clark—he was sitting or lying on the ground there by the spur switch at the Shannon switch.

Q. Did you have any conversation with him?

A. I asked him if he was hurt and he said he thought he was hurt. I asked him if he was hurt very bad and he said he didn't know how bad he was hurt, but hip and side was hurt.

Q. Anything else?

A. That is all he said to me.

Q. The only complaint he made was about his side?

A. That is all—his side and hip—he put his hand on his back and said his side and hip was hurt.

Q. Did you see his face?

A. Well, I was talking to him.

Q. Looking into his face? A. Yes, sir.

Q. Was there any blood or bruises on his face?

(Testimony of J. T. Kelley.)

A. I didn't see any that I know of. I didn't see any. No blood and no bruises that I know of.

Q. Did he make any complaint to you about bruises or injury to his face? A. No, sir.

Q. Or head? A. No, sir.

Q. Did you see a fellow there by the name of Jeff Dunagan?

A. Can't say that I did. There were several people around there—can't say whether I saw him or not.

Q. Do you know him? A. Yes, sir.

Q. Know him well? A. Yes, sir.

[386] Q. If he had been there you would probably have seen him?

A. That is what I say. Chances is he was there and I seen him and not remember it, but I wouldn't say I seen him.

Q. How long has Mr. Clark been operating that engine in switching cars there in that yard?

A. Well, I think up to that time about two years Mr. Clark had been on that engine, around about that time, as regular engineer—what we call regular man on the engine.

Q. Do you know whether he is a careful or negligent man—engineer—in the operation of his engine in switching cars?

Mr. SEABURY.—We object to the question as incompetent, irrelevant and immaterial.

The COURT.—I sustain the objection.

Mr. McFARLAND.—We except to the ruling of the court.

(To the witness.)

(Testimony of J. T. Kelley.)

Q. Do you know of any instances prior to the accident, say within the space of two years, where he was negligent and careless in the operation of his engine in respect to obeying signals?

Mr. SEABURY.—We make the same objection.

The COURT.—Same ruling.

Mr. McFARLAND.—We except. Now, if the Court please, we offer to prove by this witness that Mr. Clark for two years previous to this injury by this accident was habitually careless and negligent in obeying signals given him while operating his engine in switching cars in the yards of the defendant. We offer further to show by this witness that in many instances which occurred possibly almost daily within two years previous to the happening of this accident that he uniformly and habitually disobeyed signals given to him as engineer in the operation of his engine and this train while switching in these yards.

[387] Mr. SEABURY.—We object to the offer and again respectfully protest against its being made and ask that it be excluded.

The COURT.—The ruling made will stand.

Mr. McFARLAND.—It is denied?

The COURT.—Yes.

Mr. McFARLAND.—To which we except.

Cross-examination.

(By Mr. SEABURY.)

Q. Mr. Kelley, who were the men under your direction and control? A. Mr. J. M. Kline.

Q. You gave orders to him in connection with moving cars in the yard? A. Yes, sir.

(Testimony of J. T. Kelley.)

Q. Now, you say you have been engaged there as yardmaster for many years, and that you never refused to set brakes on cars standing on that piece of track at the request of Mr. Doran?

A. I say I never refused to set brakes on that piece of track for Mr. Doran.

Q. Did any other person ever ask you to have those brakes set? A. No, sir.

Q. Never did?

A. Not that I am aware of, no, sir.

Q. You knew that there was a grade there, didn't you, in March, 1911? A. A grade?

Q. Yes. A. You mean a railroad grade?

Q. Yes.

A. Why, there is a track there for cars to run on.

[388] Q. But there is an incline there in the track, isn't there—a downgrade?

A. I can't say there is any downgrade there between that point there.

Q. Between the crossing and the Shannon switch?

A. Between the crossing and the Shannon switch? Downgrade which way?

Q. I asked you whether there was any incline there. A. Was there an incline there?

Q. Yes. A. Not that I know of.

Q. Was there any grade one way or the other?

A. The way I would say, if there was any grade there was a little down from the Shannon switch going south of probably, well, two cars and a half or three cars—just practically level, but the track would be inclined to be down for about that distance.

(Testimony of J. T. Kelley.)

Q. So, whatever incline there was would pitch in a northerly direction? A. No, sir.

Q. It would not?

A. No, sir, not from that point where I say.

Q. Take it from that point north of the railroad crossing and between the Shannon switch and the railroad crossing—is that an absolutely level piece of track or not?

A. Well, I always thought it was practically level.

Q. I mean in March, 1911. I don't mean now.

A. I mean all the time, right up—

Q. You mean all the time?

A. Yes, any time I have been there.

[389] Q. Has that track remained in the same condition ever since March, 1911?

A. That track has been worked on since March, 1911.

Q. You mean that it has been altered or changed?

A. The section foreman has done some track work on there since then.

Q. I ask you whether it is in the condition it now is in March, 1911.

A. It was in the same—it is not in the same condition now as March, 1911.

Q. What I particularly want to know from you is whether you think in March, 1911, there was any incline or downgrade on that track between the crossing and the Shannon switch.

A. Between the crossing and the Shannon switch?

Q. Yes. A. I do.

Q. You do think there was a downgrade?

(Testimony of J. T. Kelley.)

A. Yes, sir.

Q. How much?

A. I can't say how much, but I think for two and a half or three cars it was inclined to be a little down.

Q. Now, you say, as I recall it, that you never saw cars move except by motive power in that particular place. A. Yes, sir.

Q. Did anyone ever tell you cars moved there without motive power at that place?

A. Has anybody ever told me cars has moved?

Q. Yes. A. Yes, sir.

Q. Did anyone ever tell you that before March, 1911? [390] A. I can't say.

Q. Would you say no one did tell you that before March, 1911?

A. I wouldn't say nobody told me, either.

Q. You knew it was downgrade before March, 1911, did you not?

A. I said I knew it was a little downgrade there.

Q. What I mean is, you knew that it was prior to March, 1911, did you not? A. Yes, sir.

Q. Now, the fact is, as I understand you, you never did cause brakes to be set on cars standing in that particular place.

A. I have never given any instructions to have brakes to be set on that one particular place; no, sir.

Q. Did you ever give any instructions to have cars blocked in that particular place? A. No, sir.

Q. Have you ever seen cars move without motive power on any kind of a track, Mr. Kelley?

(Testimony of J. T. Kelley.)

A. Have ever I seen cars move without motive power on any kind of a track?

Q. Yes, sir. A. Yes, sir.

Q. What kind of a track was that?

A. Grade and also level track. I have seen cars move on level track.

Q. Without power? A. Without power.

Q. What made those cars move?

A. I have seen where they have moved.

Q. What made them move? Didn't that have some power to start them?

[391] A. I couldn't say what caused them to move at all, sir.

Q. Was there any engine on those cars either way when you saw them move?

A. I say I know of them moving.

Q. But you didn't see it yourself? A. No, sir.

Q. Now, isn't it a fact that if one or more freight-cars had been left standing on this Shannon switch without brakes set and without being blocked, would those cars have moved without any motive power—do you understand what I mean? I show you Plaintiff's Exhibit One and direct your attention to the siding or switch called the Shannon switch—

A. Yes, sir.

Q. That track had a more inclined grade—a steeper grade—than the main track?

A. This Shannon switch?

Q. Yes. A. Yes, sir.

Q. Now, I ask you as a railroad man, if one or more freight-cars had been left standing on that

(Testimony of J. T. Kelley.)

portion of the Shannon switch to which I have directed your attention, would that car move or would it not move without motive power if the brakes were not set and if it were not blocked?

Mr. KIBBEY.—We object to the question. There is no evidence that any cars have been left there—it throws no light on this subject at all—unless the conditions were similar.

Mr. KEARNEY.—The examination of Morton shows the grade there.

The COURT.—The same grade?

Mr. SEABURY.—No, a different grade entirely.

The COURT.—The objection is sustained.

[392] (By Mr. SEABURY.)

Q. Do you know the difference in grade between that portion of the Shannon switch and the portion of the main line between the crossing and the switch? A. No, sir.

Q. All you know is that the Shannon switch is a steeper grade than the main line?

A. Yes, sir; it is steeper going up Shannon than on the main line.

Q. Now, in the course of your years' experience there, Mr. Kelley, you have said, as I understand you, that you did not think it was necessary to have the brakes set in standing cars on the main line?

A. Yes, sir; I didn't think it necessary to have brakes set on them cars.

Q. Now, I ask you to tell me whether you think it is necessary to set brakes on cars if left standing on the Shannon switch?

(Testimony of J. T. Kelley.)

Mr. KIBBEY.—We object to that.

The COURT.—I sustain the objection.

Mr. SEABURY.—I think I am entitled to that, but I won't argue it if the Court doesn't wish me to.

The COURT.—The objection is sustained.

Mr. SEABURY.—We except to the ruling of the Court.

(To the witness.)

Q. Do you know, Mr. Kelley, on what kind of a grade a car will move without any motive power if not braked and not blocked?

A. I don't quite understand.

Q. Do you know how steep a grade would have to be before a freight-car which is not braked and not blocked would move of itself?

[393] A. No, I do not.

Q. You don't know. Did you ever try to find out?

A. No, sir.

Q. And although for a period of some five years you were yardmaster in that yard and knew that there was some grade or incline on the main track and knew that cars were repeatedly being placed there without brakes, you never made any effort to find out how steep that grade was?

A. I never thought it necessary for there was not enough grade there for a car to start on.

Q. That is simply your opinion of it.

A. That is my opinion.

Q. Would that opinion in any way be affected or changed if people told you that they had seen cars move there repeatedly when they were not braked

(Testimony of J. T. Kelley.)

and not blocked? A. Would that affect me?

Q. Yes.

A. By me not leaving freight-cars without brakes?

Q. Yes. A. No, sir.

Q. That wouldn't affect your opinion at all?

A. No, sir.

Q. In other words, you would rather have your own opinion than the positive statements of another man that he had seen it take place?

A. I will say that—I didn't say—pardon me, put that to me again, will you?

Q. Yes, indeed. I say, you would rather rely upon your own opinion that cars would not move on that grade than you would upon the statement of some man who had seen cars move under those conditions.

[394] A. My opinion is that cars would not move on that grade any time I left them there or any time I seen them left there on that piece of track.

Q. Now, Mr. Kelley—

Mr. KIBBEY.—I want to object to the form of the question.

Mr. SEABURY.—I haven't put the question.

Mr. KIBBEY.—You were going to repeat the question.

Mr. SEABURY.—Possibly not.

Mr. KIBBEY.—Put the question, then.

(By Mr. SEABURY.)

Q. Whether or not the car would move at that place would depend on different questions, would it

(Testimony of J. T. Kelley.)

not? A. On different questions?

Q. I will put it this way: Suppose cars were standing on that track without brakes being set and without being blocked and another car butted into them, I ask you whether in your opinion that jar or jolt would be sufficient to make those cars run down that track to the Shannon switch?

Mr. KIBBEY.—We object to the question. There is no evidence of a car butting into any cars here.

The COURT.—I sustain the objection.

(By Mr. SEABURY.)

Q. Do you know whether a strong wind would be sufficient to place cars left between the crossing and the Shannon switch on the main line without brakes and without being blocked, in motion?

A. Do I know if a strong wind would?

Q. Yes. A. I do not.

Q. You don't know? A. No.

Q. Do you know whether cars would more easily move in that [395] part of the track in the winter time than in the summer time?

A. Move more easily in the winter time than in the summer time?

Q. Do you know whether they would move more easily in one season of the year than another?

A. No, in cold weather a car won't move as easily as in warm weather—that is, the oil and waste is more solid in the boxes and cars will not move as easy.

Q. Now, a car that has been in motion for a con-

(Testimony of J. T. Kelley.)

siderable period of time and then placed at a standstill will move more easily than one that has not been moved for some time?

Mr. KIBBEY.—We object to the question. There is no evidence that these have been in motion a considerable length of time.

The COURT.—I think that question may be answered.

(By Mr. SEABURY.)

Q. What do you say about that? Would cars move of their own motion more easily if they had been placed at a standstill after having been moved for some slight distance than if they had been standing there before having been previously moved?

A. Might have a tendency to cause them to move more readily. I wouldn't say just how easy.

Q. Now, as I understand you, you don't pretend to say Mr. Dunagan was not present?

A. No, sir, I didn't say Mr. Dunagan was there.

Q. You were in court when Mr. Dunagan said he was there?

A. I heard Mr. Dunagan say he was there, yes, sir.

Mr. SEABURY.—That is all.

Redirect Examination.

(By Mr. McFARLAND.)

Q. In reply to a question of counsel, you said you never [396] gave instructions to set brakes on that particular part of the track when cars are left standing on that track. Why do you say you never gave instructions?

(Testimony of J. T. Kelley.)

Mr. SEABURY.—We object to the question.

The COURT.—Why does he say so, or—

Mr. McFARLAND.—Why did he give such instructions?

The COURT.—He just stated the reason *why was* he didn't think it was necessary.

(By Mr. McFARLAND.)

Q. Do you remember the kind of a day that was—whether hot or cold?

A. Well, it wasn't what you call right freezing weather that I remember of, but it was a fine day.

Q. Was there any wind blowing?

A. Not that I remember, there was no wind.

Q. Now, I understand you to say that the grade of that road inclines two or three car-lengths south—inclines down a little two or three car-lengths from the switch south.

A. That is what I said.

Q. Then from that point to the crossing of the road—the wagon road—at the Shannon store it is practically level?

Mr. SEABURY.—We object to the question.

(By Mr. McFARLAND.)

Q. I understand you to say that.

Mr. SEABURY.—We object.

The COURT.—What did you say in reference to that?

The WITNESS.—It is practically level up to the crossing there, that is what I say it is.

(By Mr. McFARLAND.)

Q. Was that the condition on the 15th of March, 1911?

(Testimony of J. T. Kelley.)

[397] A. It was that way right along there.

Q. It is practically the same now?

A. Practically the same now; about the same thing now.

Mr. McFARLAND.—That is all.

Mr. SEABURY.—That is all.

(Witness excused.)

[Testimony of J. G. Lindsey, for Defendant.]

J. G. LINDSEY, being called as a witness in behalf of the defendant and duly sworn, testifies as follows:

Direct Examination.

(By Mr. KIBBEY.)

Q. State your name, please.

A. J. G. Lindsey.

Q. Where do you live? A. In Phoenix.

Q. What is your business?

A. Assistant superintendent of the Arizona Eastern.

Q. How long have you been engaged in railroad-ing? A. About thirty years.

Q. In what capacity?

A. I started in as telegraph operator, worked as train dispatcher, chief dispatcher, train-master and assistant superintendent.

Q. What are the duties of train-master?

A. The train-master's duty is to have supervision of all outside movement of cars, trains and yards and the trainmen.

Q. How much experience have you had in the observation and direction and consideration of the

(Testimony of J. G. Lindsey.)

movement of cars? A. Twelve years.

Q. Suppose, Mr. Lindsey, there was a track that had a slight grade running from a switch—the grade having a slight tendency [398] down for a slight grade for two or three car-lengths and then practically level for a considerable distance—what would be the probability of loaded cars being stopped on that track—what would be the probability of their moving of their own accord?

Mr. SEABURY.—We object to the question on the ground that it is not sufficiently clear to enable the witness to answer.

The WITNESS.—I was going to ask to have it made more clear.

The COURT.—In what respect—the grade not established?

Mr. SEABURY.—Yes, and the surrounding circumstances are not at all as described by the witnesses.

Mr. KIBBEY.—The question is clear enough to me. Does the witness understand the question?

The WITNESS.—I understand the question, but would like to ask a question before replying.

(By Mr. KIBBEY.)

Q. Yes.

A. I would like to know what per cent the grade is.

Q. I will give you that. Beginning at the switch on the main line and then running south from the switch on the main line, the grade for the first twenty-five feet is down away from the switch two-

(Testimony of J. G. Lindsey.)

tenths of one per cent, and then for the next seventy-five feet it is one-tenth of one per cent grade down away from the switch, and the next twenty-five feet it is twenty-eight one-hundredths of one per cent down away from the switch—

A. Is that down all the way in the same direction?

Q. Yes. Then for the next fifty feet it is one-tenth of one per cent down away from the switch; it is then for the next twenty-five feet one-tenth of one per cent grade up, and for the next twenty-five feet it is one-tenth of one per cent grade down [399] away from the switch, the next twenty-five feet it is one-tenth of one per cent grade up from the switch; the next twenty-five feet is one-tenth of one per cent grade down away from the switch; then the next twenty-five feet it is forty-eight one-hundredths of one per cent up. Now, suppose four loaded cars were left standing upon that track stationary when left by the engine, what would be their tendency to roll or move of their own volition?

Mr. SEABURY.—We object to the question. It is not properly framed as a hypothetical question—too vague and indefinite, and having no sufficient application to the facts of this case.

The COURT.—He may answer.

Mr. SEABURY.—We except.

The WITNESS.—As I understand it, all the grade back from the switch is down away from the switch excepting two points, one of which is one-tenth of one per cent and one forty-eight one-hundredths; is that right?

(Testimony of J. G. Lindsey.)

Mr. KIBBEY.—For a hundred and seventy-five feet it is down.

Mr. SEABURY.—We object to that as constituting testimony on the part of counsel—the witness is interrogating counsel.

The COURT.—He is interrogating him as to the hypothetical question.

Mr. SEABURY.—As to the fact.

The COURT.—As to the fact assumed in the hypothetical question, isn't that true?

Mr. KIBBEY.—Yes.

The COURT.—He may answer.

The WITNESS.—On a level grade a loaded car will develop a resistance of eighteen pounds per ton—that is, it would take an energy equal to eighteen pounds per gross ton, twenty-two hundred and forty, to move that car on level grade, and on a one per [400] cent grade we add twenty pounds resistance to the grade per one per cent.

Mr. SEABURY.—I move to strike the answer out on the ground that it is not responsive.

The COURT.—I think it is partly responsive—part of his answer.

The WITNESS.—I had not finished. On this grade of one per cent down, cars would have a tendency, if moved at all, to go away from the switch—that is, in the direction the grade is down. Before we move them at all we would need energy of about sixteen pounds per ton to move them in any direction.

Mr. KIBBEY.—Q. Now, what would you say with respect to those cars moving at all, and if they moved

(Testimony of J. G. Lindsey.)

at all of their own volition, in what direction?

Mr. SEABURY.—We object to the question as incompetent, irrelevant and immaterial.

The COURT.—I overrule the objection.

Mr. SEABURY.—We except.

The WITNESS.—The cars wouldn't move at all of themselves under those conditions, but if moved by wind they would have a tendency to go downhill, of course, which is the way the grade runs.

(By Mr. KIBBEY.)

Q. In the operation of switching from the main line on the grades as I have described, in practice, would you regard it as necessary to set brakes on those cars?

Mr. SEABURY.—We object to the question on the ground that the witness is not shown to be properly qualified to answer it.

The COURT.—So far as that is concerned I think the witness has shown himself *prima facie* competent.

[401] Mr. SEABURY.—On the ground that the witness is asked to state whether the usual course of practice of the defendant is safe or unsafe—that is the practical effect of this question.

The COURT.—No, I don't think so.

Mr. KIBBEY.—The ordinary course of railroad-ing.

The COURT.—What is the question?

Mr. KIBBEY.—Whether or not in the ordinary practice it is regarded as necessary to set brakes to hold those cars on a grade of that kind.

(Testimony of J. G. Lindsey.)

The COURT.—I didn't understand the question. The objection is sustained to that.

(By Mr. KIBBEY.)

Q. Do you, in the ordinary course of your practice with grades of that character in the operation of cars, direct brakes to be left set on cars standing?

Mr. STABURY.—We object to the question. This witness cannot act as the measure of the standard of care as it may affect the acts of the defendant in this case. It is incompetent and should be excluded.

The COURT.—I think that point is well taken.

Mr. KIBBEY.—My suggestion is that what is regarded generally as the practice in a matter of this kind is to be taken into consideration in determining whether or not they are exercising care. If a man performs an operation in one way and another in another, it is evident which is the best and safest, and by taking the general practice—if things are done usually over the country in that particular business—then it is not negligent, I would take it, if in this particular instance it was done in that way.

The COURT.—If the defendant has exercised ordinary care.

Mr. KIBBEY.—I am not asking for ordinary care; I am asking what [402] the practice is.

The COURT.—I doubt if the practice establishes the rule of negligence.

Mr. KIBBEY.—In the very nature in which they are using it, it is described the practice and that in itself does constitute negligence—the application of

(Testimony of J. G. Lindsey.)

safety appliances. If you want to prove the dangerous condition of a machine, you compare it with the machines used in general practice throughout the country.

The COURT.—The best device, yes.

Mr. KIBBEY.—Yes, the best device. Why isn't it equally true as to the best methods of operation?

The COURT.—I don't think anyone would say this was the best method of insuring safety. Your question is directed to ascertaining what is the custom of railroads in regard to putting on brakes on cars standing in similar situations.

Mr. KIBBEY.—I didn't ask for the practice—

The COURT.—You are getting at that question.

Mr. KIBBEY.—I am getting at the question of practice under those circumstances. The methods employed by railroads under those conditions.

The COURT.—This is the absence of method you are proving—whether the absence of any method is the practice of railroads under similar conditions. I doubt if the absence of any safety appliance—no matter if it is an established custom—would be considered as determining the fact whether the company was negligent or not.

Mr. KIBBEY.—There is no question but what this could be made absolutely safe, but that is not the measure of care required. They could have taken up the rails so the cars could not have [403] rolled down on to this switch.

The COURT.—That is apparent; but the question is not whether companies generally use protections

(Testimony of J. G. Lindsey.)

under those circumstances. If, as a matter of fact, some measure of protection is reasonably necessary in order to safeguard employees, that would not be determined by the practice of railroads, but by the conditions.

Mr. KIBBEY.—It cannot be determined by anything else.

(Thereupon the question is argued further to the Court by counsel for the defendant.)

Mr. SEABURY.—Our position is as I have stated, and the very purpose of the jury is to determine from the facts proved whether the particular act was carefully done or negligently performed. In order to establish the fact of negligence or want of care both sides are permitted to set before the jury all the facts relating to that particular circumstance, and from those facts and those surrounding circumstances the jury as experienced men will tell us whether care was exercised or not in that particular instance, but it can in no way constitute evidence relating to that particular action to bring in Tom Jones and Smith and have them tell us they always did that. How do we know they may not have been grossly negligent? Surely no witness would be permitted to come here and say we never had any objections to so arranging our track that two freight-cars collided together.

The COURT.—If ordinary care—and ordinary care is to be determined from the facts and circumstances as they exist—did not require a particular effort on the part of the railroad company to protect their employees under these circumstances, then

(Testimony of J. G. Lindsey.)

there was a freedom from negligence. How do you establish that?

Mr. SEABURY.—Only by the surrounding situation and facts as [404] they relate to this case. It must be a question of facts for the jury to determine. No witness may be permitted to say that in the course of my business I have done thus and so when it is not the question of the adoption of some safety device.

The COURT.—It is a question of whether the danger is so remote that a reasonably prudent person could not anticipate it happening.

Mr. SEABURY.—That can only be inferred from what happened in this particular case.

The COURT.—If it is a common-sense proposition that a man with ordinary reasoning powers could determine that question, such evidence as this is wholly unnecessary, but this does call, I should say, for something in the nature of special information—the jury is not expected to know on what grade a car will move of its own weight, or what the probabilities are of its moving under any of the circumstances testified to.

Mr. SEABURY.—The evidence is already replete, if your Honor please, upon the question of what was done in this case. All of the acts performed by both parties are fully before the jury.

The COURT.—Suppose this was the only instance of the kind that men have ever known of—there are things that have occurred in this way that are unique—there might have been a ground swell there—those

(Testimony of J. G. Lindsey.)

are remote possibilities. Suppose this moving of the cars was something that no man—no reasonable man—could expect or conceive, and yet it happened? You wouldn't say from the fact that it happened his negligence had therefore been established.

Mr. SEABURY.—I think I would in this instance, because persons engaged in this particular business are charged with a high degree of care—the standard of care and its exercise are extremely high. Now, if two cars collide, as I have said, that of itself [405] is a strong indication that somebody was negligent in the matter.

The COURT.—Those are presumptions, but the question after all is to determine whether care was exercised. Now, the care required is the care which prudent men would exercise under the same conditions of safety. What may result from lack of care? If simply a little property loss might result, it is a different thing from what may result from the destruction of life. A reasonable man would take greater precaution of life. A reasonable man would take greater precaution in one instance than in the other. So ordinary care is what could be exercised by ordinarily prudent men engaged in this business. If this was an unforeseen thing—that is, if it could not have been foreseen as at all likely to happen, that is a thing which I think the jury have a right to consider.

Mr. SEABURY.—We think the evidence is extremely harmful to the plaintiff and prejudicial.

The COURT.—If it bears upon the question of

(Testimony of J. G. Lindsey.)

probability of the thing happening, it might be admissible.

Mr. SEABURY.—May I suggest right here that there is no question but what it happened—no question of how it happened. Their own witnesses have testified to that.

The COURT.—But if it was a most unusual occurrence then the jury have a right to know that.

Mr. SEABURY.—They would undoubtedly have a right to consider the unusual occurrence if it was unusual.

The COURT.—We only get our knowledge largely from experience.

Mr. SEABURY.—But this evidence would not tend to prove whether those persons exercised care or did not.

The COURT.—I should think so. If this was a unique accident almost in the annals of railroading, or occurred so infrequently under the same conditions as to be almost—that is the chance [406] would seem to a reasonable man to be negligible—would he still be required to take the precaution?

Mr. SEABURY.—Suppose a car is left stationary upon a main line and an express train comes along the main line and runs into it—that is a decidedly unusual occurrence in railroading—

The COURT.—A frequent occurrence—I have read of those things very, very often.

Mr. SEABURY.—There is no question about that being a negligent act, and I contend that certainly no other railroad man would be permitted to come in

(Testimony of J. G. Lindsey.)

and say in our practice we have allowed cars to remain in this condition.

The COURT.—The question is whether that really does establish the thing or not.

Mr. McFARLAND.—May I refresh the Court's memory on a case before the Supreme Court of this Territory—the case of Lyons—the one question there was whether the conditions existing under that shed was a reasonably safe operation or was it not.

(Thereupon the question is argued further to the Court—the further argument not being taken down by the reporter.)

The COURT.—(At the conclusion of the argument.) I am in doubt about it, but I presume the rule should be not to exclude the evidence if it is clearly not immaterial. Perhaps there is less risk in letting it go in than to exclude it. The Court can subsequently cover the matter by his instructions if there is any doubt about it.

Mr. SEABURY.—Your Honor will receive it?

The COURT.—Yes.

Mr. SEABURY.—Permit me to except.

Mr. KIBBEY.—Will the reporter please read the last question?

(Thereupon the reporter reads the following question: Q. Do you in the ordinary course of your practice with grades of that character [407] in the operation of cars, direct brakes to be left set on cars standing?)

The WITNESS.—Not in switching operations.

The COURT.—Is that all?

(Testimony of J. G. Lindsey.)

(By Mr. KIBBEY.)

Q. Have you had experience, either in the operation itself or by observation, of the space within which switch engines can stop themselves and the cars attached to them? A. Yes, sir.

Q. Suppose there is an engine weighing about one hundred and twenty-four thousand pounds, that has straight air as well as the automatic—that is attached to four cars—loaded cars—practically forty tons to the car—upon a level track, partly standing on a curve, having attained a speed of six miles per hour—within what distance by the exercise of the means that are at the disposal of the engineer can he stop that engine and cars after having received a signal.

Mr. SEABURY.—We object to the question as incompetent, irrelevant and immaterial and not properly framed, and assuming a state of facts not shown to exist in this case.

The COURT.—In what respect?

Mr. SEABURY.—Also on the ground that it is not properly set before the witness—the facts which have been established beyond dispute in this case. The question arises as to the time in which the signal was given and the place—this engine was not upon a curve, as I understand it at the time the signal was given—the switch constitutes the curve in question; nor does the question have anything in it—

The COURT.—Didn't the curve begin the moment the switch was struck—that is when the wheels of the engine or cars began [408] to leave the main track?

(Testimony of J. G. Lindsey.)

Mr. KIBBEY.—The curve is in the main track that I am talking about.

Mr. SEABURY.—The point of rocks is the curve I have reference to.

Mr. KIBBEY.—The question seems to be misunderstood—

The COURT.—(Examining photograph.) This looks like a straight track to me.

Mr. SEABURY.—The picture doesn't go far enough. The undisputed testimony is that there is a curve immediately at the end of that picture.

Mr. KIBBEY.—This shows the curve (exhibiting tracing to the Court).

The COURT.—Is your objection that there is no evidence that there is a curve there?

Mr. SEABURY.—No, but my objection is that the question is not sufficiently specific in that it does not state in what particular position on the curve the car was at the time the signal was given, nor does it assume to tell the witness what character of engine and what facilities existed for the stopping of it.

The COURT.—I thought those were mentioned—straight air.

Mr. KIBBEY.—The only fact I put in there that has not been proven is the weight of the engine—that is the only fact in there.

The COURT.—The objection is overruled.

Mr. SEABURY.—Exception.

Mr. KIBBEY.—I will add a fifteen degree curve.

Mr. SEABURY.—We object on the additional

(Testimony of J. G. Lindsey.)

ground that I am not familiar with any such evidence.

Mr. KIBBEY.—It was given by Mr. Bond.

[409] The WITNESS.—It would stop in about sixty feet.

Mr. KEARNEY.—I move to strike out the testimony of the witness as irrelevant, incompetent and not proving or tending to prove any issue in this case.

The COURT.—The motion will be denied.

Mr. SEABURY.—We except. That is all, Mr. Lindley.

(Witness excused.)

[Testimony of Ingraham T. Sparks, for Defendant.]

INGRAHAM T. SPARKS, being called as a witness in behalf of the defendant and duly sworn, testifies as follows:

Direct Examination.

(By Mr. McFARLAND.)

Q. Give you name to the reporter, please.

A. Ingraham T. Sparks.

Q. Where do you live? A. In Phoenix.

Q. How long have you lived here?

A. About eleven years.

Q. What is your business?

A. I am a railroad conductor.

Q. What branches of railroading has your experience covered?

A. I started in when I was about fifteen, I guess, as yard clerk—from yard clerk I went to bill clerk, bookkeeper in the auditor's office, chief clerk to the General Superintendent, foreman on a track and

(Testimony of Ingraham T. Sparks.)

brakeman and conductor.

Q. What period did your experience cover as foreman on a track?

A. Just on the Arizona Eastern here. I ran a train and extra gang too at the same time. We were taking up small rail and putting down big rail—taking up forty pound and putting down sixty-two pound.

Q. Do you know anything about the operation of cars on a railroad, [410] either from experience or observation?

A. Yes, sir, I have done a good deal of switching in my life.

Q. Where?

A. Well, here—most of it here on the Arizona Eastern—the old M. & P. I have run a mixed train here for going on ten years—mixed passenger train.

Q. On different kinds of road and different kinds of cars?

A. Yes, sir, I have run on good track, bad track and all kinds of track. We haven't so many grades here, but I have been on roads—I was in Mexico on roads where we had heavy grades.

Q. Then you are familiar with the operation of trains on those different classes of grades?

A. Yes, sir.

Q. Mr. Sparks, suppose that there is a track—railway track—with a grade about eight hundred feet long between two points that I will call your attention to—that the grade from this point is down two-tenths of one per cent—

(Testimony of Ingraham T. Sparks.)

A. From the switch coming this way?

Q. Yes—two-tenths of one per cent for twenty-five feet and for seventy-five feet it is one-tenth of one per cent down—two-tenths for twenty-five feet and then for seventy-five feet additional on this track I am calling your attention to it is one-tenth of one per cent down—and for the next twenty-five feet it is twenty-eight one-hundredths per cent down and for the next fifty feet it is one-tenth of one per cent down—

A. Still coming this way?

Q. Yes. Now, for the next twenty-five feet it is one-tenth of one per cent up, and the next twenty-five feet it is one-tenth of one per cent down, for the next twenty-five feet it is one-tenth of one per cent up, the next twenty-five feet it is one-tenth of [411] one per cent down, and the next twenty-five feet it is forty-eight one-hundredths of one per cent up.

A. How many feet is that all told?

Q. Three hundred feet. Now, what would be your opinion as to cars rolling on that grade of their own volition after they had been stopped?

Mr. SEABURY.—We object to the question as irrelevant and immaterial—no sufficient qualification of the witness and no sufficient framing of the hypothetical question.

The COURT.—He may answer.

Mr. SEABURY.—Exception.

The WITNESS.—That would be about seven car-lengths—three hundred feet—back from the grade. Do you mean?

Mr. McFARLAND.—I mean to say—

(Testimony of Ingraham T. Sparks.)

The COURT.—Let him ask his question.

The WITNESS.—Of course I have heard some of this evidence back there and everything. To leave the car in the clear you would have to leave it back from the frog that way fifteen or twenty feet, and that would put all those cars on the down grade away from the switch, practically. The first twenty-five feet was toward the switch—

Mr. KIBBEY.—No, that is down from the switch.

Mr. McFARLAND.—Two-tenths of one per cent or five-eighths of an inch down.

The WITNESS.—If those cars would roll at all, it would have a tendency to roll away from the switch—the grade seems to be that way—seven car-lengths down.

(By Mr. McFARLAND.)

Q. Suppose four cars loaded—approximately forty tons to the car—and left standing on that track within the points to which your attention has been called—what would you say as—without [412] brakes—what would you say as to their rolling or not rolling?

Mr. SEABURY.—We object to the question on the ground already urged.

The COURT.—I overrule the objection.

Mr. SEABURY.—Exception.

The WITNESS.—What was the question?

(By Mr. McFARLAND.)

Q. What would you say as to whether the cars would roll or not?

A. Well, cars are curious things—can't always tell.

(Testimony of Ingraham T. Sparks.)

In my experience in ten to eleven years that I have been in train service, I have had one or two cars roll on me when I would leave them, and you just can't tell what makes them roll.

Q. Would you reasonably expect cars under those conditions to roll without brakes set?

Mr. SEABURY.—We object to the question.

The COURT.—I overrule the objection.

The WITNESS.—No, unless some wind was blowing or something of that sort.

(By Mr. McFARLAND.)

Q. You would consider that a reasonably safe operation by the defendant in switching cars on that particular part of the road on the grade as shown to you?

Mr. SEABURY.—We object.

The COURT.—I sustain the objection to that.

(By Mr. McFARLAND.)

Q. Do you know the method pursued by other railroads in operating their cars in switching on grades similar to the one here described?

Mr. SEABURY.—Just answer yes or no to that.

The WITNESS.—I would have to describe a switch before I could tell.

[413] Mr. SEABURY.—I object.

(By Mr. McFARLAND.)

Q. Do you know the methods pursued by railroad companies in operating their cars on lines similar to the one here in reference to switching?

Mr. SEABURY.—We object to the question as incompetent and irrelevant and inadmissible.

(Testimony of Ingraham T. Sparks.)

The COURT.—That calls for his knowledge.

(To the witness.)

Q. Are you familiar with switching?

A. Yes, sir.

Q. Can you answer the question that was put yes or no?

A. It would be hard unless I knew what kind of a switch they are talking about. You very seldom on level track set any brakes—

Mr. SEABURY.—Wait a minute now—

The COURT.—We are getting at your ability to answer the question when it is put to you.

Mr. SEABURY.—Let him ask the question again.
(By Mr. McFARLAND.)

Q. Now, suppose it was the custom of the defendant to leave cars standing without brakes on the line of railway and on the track that has been described to you. A. Yes, sir.

Q. Is that, so far as you know, the method pursued by other railroads in the operation of their cars on similar tracks?

Mr. SEABURY.—We object to it as incompetent.

The COURT.—I sustain the objection.

Mr. McFARLAND.—We except.

(To the witness.)

Q. Would you say that the operation of its cars on that particular [414] piece of track by leaving them standing on the track without brakes was a reasonably safe operation of those trains?

Mr. SEABURY.—We object.

The COURT.—I sustain the objection.

(Testimony of Ingraham T. Sparks.)

(By Mr. McFARLAND.)

Q. Do you know as a matter of fact whether the cars left standing on that kind of a track and grade would roll or not roll without having the brakes set?

Mr. KEARNEY.—We object.

The COURT.—He may answer that question.

Mr. KEARNEY.—Exception.

The WITNESS.—I don't think it would roll.

(By Mr. McFARLAND.)

Q. I mean of their own motion—without some outside force.

A. They would have to have something to start them.

Q. Have you ever had any experience or observation in stopping trains when in motion?

A. Yes, sir.

Q. Suppose that an engine weighing approximately one hundred and twenty-four thousand pounds was attached to four loaded cars, approximately forty tons to the car—

A. That is, the load is forty tons?

Q. Yes. This engine was equipped with straight air and other appliances for use in stopping and starting the engine, and that that engine and those cars were going approximately six miles an hour on a slight curve—on a curve of fifteen degrees. In what distance would you say that the engine could be stopped—that the engineer could stop his engine and that train going approximately six miles an hour?

Mr. SEABURY.—We object to the question as incompetent and [415] not properly framed and

(Testimony of Ingraham T. Sparks.)

assuming a state of facts not properly proven.

The COURT.—I overrule the objection.

Mr. SEABURY.—We except.

The WITNESS.—Well, sir, in switching—

The COURT.—Just answer the question.

The WITNESS.—Two car-lengths.

(By Mr. McFARLAND.)

Q. What would that be in feet?

A. It depends on whether they are thirty-six foot or forty foot cars.

Q. Forty foot cars.

Mr. SEABURY.—We object. There is no evidence as to the length of the cars.

The COURT.—What do you mean by cars?

The WITNESS.—If switching passenger-cars you give passenger car-lengths, if switching freight-cars you give freight-car lengths; but if they were going six miles an hour I figure about two car-lengths to stop the cars and engine going at that speed. That would be anywhere from eighty feet to seventy feet, according to the length of the cars.

(By Mr. McFARLAND.)

Q. Then your opinion is that the cars can be stopped in eighty feet from the time he got the signal?

Mr. SEABURY.—We object.

The COURT.—I overrule the objection.

The WITNESS.—Yes, sir, at six miles an hour. It is surprising how quick a train can stop.

(By Mr. McFARLAND.)

Q. What is the usual distance that a signal is given

(Testimony of Ingraham T. Sparks.)
in order [416] to stop a train of cars when switching in the yards?

Mr. SEABURY.—We object to the question as incompetent, irrelevant and immaterial, not having any bearing on this case.

The COURT.—I think that is cross-examination.

Mr. McFARLAND.—Is the objection sustained?

The COURT.—Yes, on that ground.

(By Mr. McFARLAND.)

Q. Is there any usual distance that brakemen give signals before they desire to have a train stop?

Mr. SEABURY.—We make the same objection.

The COURT.—I think that is cross-examination—he has stated his opinion.

Mr. McFARLAND.—That is all.

Cross-examination.

(By Mr. SEABURY.)

Q. Have you ever operated an engine as engineer?

A. I have helped out some time if the engineer would want to go back to get a drink of water or something like that, out on the Chandler branch, something like that—switchman or engineer would want to go and get a cup of coffee, I would help out.

Q. Did you ever test an engine to find out in what time you could stop it?

A. I have made enough switches to know.

Q. You have? A. Yes, sir.

Q. Do you know anything about the kind of engine that was involved in this case?

A. From what I hear them talk—it was a goat, or switch engine.

(Testimony of Ingraham T. Sparks.)

Q. Is that all you know about the kind of engine involved in [417] this case?

Q. Generally all goats and switch engines are alike—all similar.

Q. They are?

A. All that I have ever seen—the way they speak of them.

Q. Don't the appliances differ?

A. Some have straight air and some haven't straight air—different kinds of airs—there is all kinds of things, you know.

Q. Is that the only difference that would exist with reference to it?

A. With standard switch engines?

Q. Yes.

A. They are all just alike. If you see one you see them all.

Q. Practically know them all?

A. Practically all alike. Of course there is exceptions to all cases.

Q. Now, the promptness with which a switch engine might be stopped would that depend at all upon the degree of steam they had on that car at that time—on the engine—the amount of steam power?

A. When a man applies his air he generally shuts off his steam if he is going to stop.

Q. But the grade would have something to do with the promptness in which he could stop the car?

A. Yes, sir.

Q. And whether it was on a curve or not?

A. Cars bind a little more on a curve than on straight track.

(Testimony of Ingraham T. Sparks.)

Q. The weight of the load would affect it?

A. Loads pull a little harder on a curve than on a straight track.

[418] Q. Do you know anything about the usual weight of switch engines used as in this case?

A. Switch engines?

Q. Yes.

A. I couldn't say. Some are heavier and some are lighter. What is the weight of this engine?

Q. I don't know, I am asking you. They do differ, do they? A. Yes, sir, they differ some.

Q. What do you think is the usual weight of such an engine—do you know at all?

A. I couldn't say—some go as high as one hundred and eighty thousand pounds. The engine always has the weight marked right back of the tender.

Q. You frequently notice those in other cases?

A. No, sir; don't pay much attention to it when working with an engine—just happen to glance at it.

Q. You don't know any of the men involved in this occasion? A. No, sir.

Q. You don't know anything about it at all?

A. I know just what I have heard.

Mr. SEABURY.—That is all.

(Witness excused.)

[Testimony of Paul Reissinger, for Defendant.]

PAUL REISSINGER, being called as a witness in behalf of the defendant and duly sworn, testifies as follows:

(Testimony of Paul Reissinger.)

Direct Examination.

(By Mr. McFARLAND.)

Q. What is your name?

A. Paul Reissinger.

Q. Where do you live?

A. Clifton, Arizona.

[419] Q. How long have you lived there?

A. Between six and seven years.

Q. What is your business?

A. Railroad superintendent at present.

Q. How long have you been railroading?

A. Thirteen years.

Q. Now, what experience does that cover—that time?

A. Location and railroad construction and track work—maintenance of track and supervision over the keeping it up—and in some cases actual work itself in its various branches.

Q. Were you ever connected with any other railroad? A. Yes, sir.

Q. What ones?

A. The Victoria, Vancouver and Eastern on construction, and the Great Northern Railroad in maintenance and construction and location also—and the Montana Central—those roads all belong to the same road—they are all great Northern—they weren't at that time, however.

Q. What position do you now hold with the defendant company? A. Railroad superintendent.

Q. How long have you been in that position?

A. It is three years the first of last August.

(Testimony of Paul Reissinger.)

Q. Were you in that position on the 15th of March, 1911? A. I was.

Q. What are the duties connected with that office, particularly with reference to track and the operation of trains.

A. I have general supervision over the operation of the entire road.

Q. Do you know Thomas P. Clark? A. I do.

Q. How long have you known him?

[420] A. Well, he was one of our engineers before I was made superintendent. I knew who he was before that time, off and on. He was there when I came.

Q. What position did he occupy on the 15th of March, 1911?

A. He was engineer on our switch engine.

Q. On the particular switch engine that has been described here? A. I believe so; yes.

Q. Can you describe that engine?

A. That is a six-wheel switching engine with all the weight of the engine proper on the drivers.

Q. What weight do you mean by weight on the drivers?

A. The entire weight of the engine itself, without the tender, it is on the drivers in order to give it more adhesion.

Q. The entire weight?

A. Of the engine proper—on the drivers.

Q. How much is that weight, do you know?

A. It is about one hundred and twenty-four thousand pounds, under normal conditions.

(Testimony of Paul Reissinger.)

Q. About one hundred and twenty-four thousand pounds? A. Yes.

Q. Is it what is commonly called a goat engine in railroad parlance?

A. It is generally known as a goat; yes.

Q. How is it equipped with reference to brakes?

A. It has the automatic air brakes on it and the straight air.

Q. Both? A. Both.

Q. Are you familiar with the track of the defendant railroad between what is known as the Shannon switch and the San Francisco railroad bridge?

A. Yes, sir.

[421] Were you familiar with that track on March March 15th, 1911? A. Yes, sir.

Q. Do you know its condition then?

A. Yes, sir.

Q. What was its condition on March 15th, 1911, compared with its condition three weeks later at the time Mr. Bond made this survey?

A. There had been no change whatever—unless it was what little change would be made by the track having been pounded down a little more by the extra traffic that ran over it.

Q. Practically, was any work done on that track?

A. Not a particle, to amount to anything.

Q. For three weeks subsequent to the 15th day of March to the time this survey was made?

A. How much change do you mean?

Q. Well, was there any different grade of that road three weeks later than it was on the 15th day

(Testimony of Paul Reissinger.)

of March? A. No, sir.

Mr. SEABURY.—I ask that the witness be permitted to state if there was any work on the road.

The COURT.—I think that is unnecessary indirect in a case of this sort. I think the superintendent can say whether it is substantially the same or not.

(By Mr. McFARLAND.)

Q. Was it the same three weeks later as it was on the 15th day of March? A. Substantially so.

Q. Was there any change in the grade of the road in that time? A. Not in that time; no, sir.

Q. Now, do you remember when you put that block signal in? A. Yes, sir.

[422] Q. Do you know the condition of that roadbed at that time?

A. Well, only in this way, that there had not been any work done down there.

Q. How often were you over that roadbed from the 15th of March up to the day you put the block signal in? A. Four times a day at the least.

Q. If there was any work being done on that road you would know it, wouldn't you?

A. Yes, sir. I might explain that when I say four times a day, I walked that track to and from the office and my house every day.

Q. Both going and coming? A. Yes, sir.

Q. Are you there other times than that?

A. Every few days—not every day, though.

Q. To what extent, if any, was the grade of that road between the Shannon switch and the bridge changed when you put that block signal in?

(Testimony of Paul Reissinger.)

The COURT.—How is that material, Judge?

Mr. McFARLAND.—This man testified that he raised the roadbed for the block signal a foot.

(To the witness.)

Q. What change of grade was made, if any, at the point of the switch at the time the block signal was put in? A. Practically none.

Q. Now, do you know Parker? A. Yes, sir.

Q. Was he at work about that time on that grade?

A. Yes, sir.

Q. Did his work there practically change the grade of the road? A. Very slightly.

[423] Q. Now, do you know what he did do there?

A. Yes, sir, I do, because he did it under my orders.

Q. Under your supervision? A. Yes, sir.

Q. Well, what did he do?

A. Previous to the time the block signals were put in there the dirt between the ties was up level with and above the tops of the ties, but in order to make the block signal work effectively this dirt had to be dug down below the tops of the ties in some places two or three inches. That was all dug out by my instructions and filled out towards the ends of the ties. In some cases he may have raised the track two or three inches and put a little dirt under some ties that were down and needed tamping up—that in spots would raise that track at the time it was done perhaps two inches—no more—and that has since been pounded down by the traffic over it so the grade is practically where it was before.

(Testimony of Paul Reissinger.)

Q. On March 15th? A. Yes.

Q. So you would say now that the grade of that road is practically the same as it was on March 15th, 1911? A. I think so; yes, sir.

Q. As a matter of fact was that grade ever raised a foot at that point?

A. It couldn't have been without my knowing something about it.

Q. And you say it was not?

A. It was not, no, sir.

Q. Did you see Mr. Clark at the date of the accident? A. I did not; no, sir.

Q. Did you see him afterwards?

A. Not until he was out of the house and able to get around.

[424] Q. Did you have any conversation with him?

A. I went up to him the first time I saw him when he was out and shook hands with him and asked him how he was getting along.

Q. How long was that after the accident, if you can remember?

A. I can't give you the actual lapse of time, but I think it was within two or three days of the first time he came up town, for it was the first time I had seen him and I had heard he was out, and I was looking for him.

Q. Was that before or after he went to El Paso?

A. I don't know about that—I don't know the time he went to El Paso.

(Testimony of Paul Reissinger.)

Q. Would you say it was a month after the accident?

A. A month or thereabouts, I should judge.

Mr. SEABURY.—That is after the accident?

The WITNESS.—After the accident.

(By Mr. McFARLAND.)

Q. But it might have been a little more. Did you have any conversation with him?

Q. I talked with him two or three minutes.

Q. What did you say and what did he say?

A. As it was the first time I had seen him I asked him about his accident—how badly he was hurt. It is pretty hard to report a conversation word for word at this length of time, but I think—I am quite sure—he told me that he had had two or more ribs broken—I have forgotten just how many—seems to me it was two—and that he had hurt his hip, and as I remember at that time—I can't remember the exact words he used, but I know my general impression was that he was feeling as if he had gotten off pretty light, and I asked him, as I naturally would, when he expected to be ready to go back to work, and he said he wasn't ready then but expected to be in a short time.

[425] Q. So far as your memory serves you, those are the only complaints he made about his injuries at that time?

A. I don't remember of any others, no.

Mr. SEABURY.—We move to strike out that portion of the witness' answer in which he says so far as he recalls the impression he got was that Mr.

(Testimony of Paul Reissinger.)

Clark said he got off pretty light. It doesn't purport to give the conversation.

The COURT.—That is a matter for cross-examination, I think.

(By Mr. McFARLAND.)

Q. Was anything said by Mr. Clark about his eye?

A. No, sir.

Q. Did he say anything about his head?

A. No, sir. I will say he did not; I would have remembered that if he had.

Q. You have had experience, you say, in the operation of trains in switching and on the main line—in the operation or observation?

A. I have had supervision of it a good many times before I came with this road and after.

Q. Do you know the grade of the track between the Shannon switch and the San Francisco bridge?

A. I know it in this way: We have the profiles made of it—of course I take these grades from the profiles.

Q. What would you say as to cars rolling if left on that part of the track between Shannon switch and the San Francisco bridge? That is, without brakes being set.

Mr. SEABURY.—We object. The witness' only knowledge of the grade is stated to be profiles which are not before the court.

The COURT.—Objected is overruled.

Mr. SEABURY.—We except.

The WITNESS.—They would not ordinarily roll.

(By Mr. McFARLAND.)

[426] Would you expect that cars would roll

(Testimony of Paul Reissinger.)

leaving them on that roadbed and on that grade?

Mr. SEABURY.—We object to it as improper and not admissible and incompetent—the witness' expectations not affecting the issue before the court.

The COURT.—I think he has already answered that question—would not ordinarily roll. I presume if that is true they would not be expected to roll.

(By Mr. McFARLAND.)

Q. Do you know anything about the operations of cars and engines in switching?

A. I have done it to some extent.

Q. Suppose that an engine weighing approximately 124,000 pounds—

The COURT.—He knows this engine, doesn't he? Why not ask him about an engine similar in character to it?

(By Mr. McFARLAND.)

Q. Suppose that an engine similar in character to the switch engine there in the yards of the defendant and used by the defendant in switching, attached to four cars loaded weighing approximately forty tons to the car, going on the track with a fifteen degree curve, going approximately at the rate of six miles per hour, what would you say would be the distance that that train and engine could be stopped?

Mr. SEABURY.—We object to the question on the ground already urged to the previous hypothetical questions.

The COURT.—I overrule *to* objection.

Mr. SEABURY.—We except.

(Testimony of Paul Reissinger.)

The WITNESS.—I think that string ought to be stopped in about one hundred feet—I think it could be.

(By Mr. McFARLAND.)

Q. Equipped as this engine was?

[427] A. Yes; if every precaution was taken and everything possible was done to stop it.

Q. Then an engineer getting a signal with a train of that kind on a grade of that kind and a track of that kind, you think it could be stopped within a hundred feet?

The COURT.—He has already said so.

(By Mr. McFARLAND.)

Q. Is there any difference in the time a train can be stopped on a curve and on a straight track?

A. Yes, indeed.

Q. Which would be the quickest?

A. You can stop quicker on a curve than on a piece of straight track provided the engineer will not always take as many chances on a piece of curved track as he would on a piece of straight track.

Mr. McFARLAND.—That is all.

Cross-examination.

(By Mr. SEABURY.)

Q. Mr. Reissinger, do you know the rate of speed necessary to ascend the Shannon switch with freight-cars such as were attached to that engine on March 15th, 1911? A. About, yes, sir.

Q. About what would be your opinion?

A. I should say they should be running between ten and twelve miles an hour.

(Testimony of Paul Reissinger.)

Q. You think one of those goat engines which you have described attached to the four freight-cars you have described could ascend the Shannon hill at less speed than ten or twelve miles an hour?

A. Yes, they can, because they do do it.

Q. They do? A. Yes.

Q. But I understand ten or twelve miles an hour would be the [428] usual rate of speed—

Mr. KIBBEY.—We object to the question as not proper cross-examination in the first place.

The COURT.—It is not cross-examination.

Mr. SEABURY.—I withdraw it.

(To the witness.)

Q. Now, you told us something about a block signal installed in this track. Whereabouts was it installed?

A. Between the south switch of the Clifton yard and the north switch of the Hill's flat yard.

Q. So that it covers the track, did it not, between the railroad crossing and the Shannon switch?

A. Yes, sir.

Q. What did you put that block signal in there for?

A. There was a number of years ago—I think in 1907—there was a collision—there are two curves, rather sharp, on this piece of track—there was a collision between a string of cars and an incoming freight train, and twice during the previous year that there had been very close calls to having collisions around those curves, and we put those block signals in there for the purpose of avoiding any dan-

(Testimony of Paul Reissinger.)

ger of any collision.

Q. Were those close calls you speak of—one collision—prior to March, 1911? A. Yes, sir.

Q. And when did you tell us the block signal was put in? A. In June.

Q. 1911?

A. 1911. We started to put it in in that month.

Q. So, as a matter of fact, you began to put it in shortly after the occurrence of this accident at that same place, did you not?

[429] A. Yes, but the material had been ordered before the accident. It takes some time to get that stuff—six months about.

Q. Who ordered the material?

A. I think Mr. Thompson was purchasing agent at that time.

Q. He was?

A. I think so, if I remember rightly.

Q. Isn't it a fact that Mr. Thompson, or those in charge of the operation of the road, knew prior to March 15th, 1911, that the track was then in a dangerous condition because of the lack of a block signal? A. No, sir.

Mr. KIBBEY.—We object to his pursuing that further. It has nothing whatever to do in this case. (By Mr. SEABURY.)

Q. You knew that portion of the track from the switch was downgrade?

A. It was not what I would call an appreciable grade at all there.

Q. It was not?

(Testimony of Paul Reissinger.)

A. Not so far as an operating standpoint is concerned.

Q. You knew it was some downgrade?

A. It is up and down a little—what you would expect from track that has not been surfaced recently.

Q. Yet it is on the main line?

A. It is on the main line.

Q. And you say between the crossing and the switch it goes both up and down?

A. Both up and down—very little, though.

Q. You know Mr. Bond, don't you?

A. Yes, sir.

Q. Do you know what Mr. Bond's measurements show with reference [430] to that road?

A. Oh, I remember what the profile was.

Q. Do you know Mr. Morton, a civil engineer?

A. Yes, sir.

Q. Have you worked with him?

A. I never have.

Q. Have you seen any of his work? A. Yes.

Q. Do you know whether or not he is a competent engineer?

Mr. KIBBEY.—We object to the question. We haven't objected to the competency of Mr. Morton.

The COURT.—I sustain the objection.

By Mr. SEABURY.—I would be glad if your Honor would allow me to conclude after luncheon—we are about to adjourn.

The COURT.—Very well.

Mr. McFARLAND.—Before we adjourn, would

(Testimony of Paul Reissinger.)

one witness be permitted to correct his testimony in one respect?

The COURT.—Who is it?

Mr. McFARLAND.—Mr. Bond.

The COURT.—If he is here.

Thereupon the witness Reissinger leaves the stand.

**[Testimony of R. C. Bond, for Defendant
(Recalled).]**

R. C. BOND, being recalled as a witness on behalf of the defendant and having been heretofore duly sworn in this case, testifies further as follows:

(By Mr. McFARLAND.)

Q. Mr. Bond, you testified yesterday that the width of that cab was ten feet six inches.

A. Yes, sir.

Q. What is it—were you mistaken in that?

A. Yes, sir.

Q. What is it? [431] A. Ten feet one.

Mr. McFARLAND.—That is all.

(Witness excused.)

The COURT.—We will take a recess until half-past one o'clock, and the jury will bear in mind not to talk about this case or to let anyone talk to you about it. Come back at half-past one.

Thereupon the court takes a recess.

At one-thirty P. M. this day, the plaintiff being present in person and represented by his counsel, and the defendant being present by its attorneys, the jurors come into court and are called by the Clerk, all answering to their names, and thereupon the following further proceedings are had herein, to wit:

[**Testimony of Paul Reissinger, for Defendant
(Recalled).**]

PAUL REISSINGER, the witness under examination before the noon recess, again takes the stand, and having been heretofore duly sworn in this case, testifies further as follows:

Mr. SEABURY.—We have no further cross-examination.

Redirect Examination.

(By Mr. McFARLAND.)

Q. What part of the defendant's roadbed was that block signal intended to prevent accidents in the operation of its trains?

A. On the curve between the Shannon switch and the south end of the Clifton yard, mainly.

Q. How far would that be north of the Shannon switch?

A. Three or four hundred feet, is the most dangerous part.

Q. Was it the intention of that block signal to prevent accidents in the switching of cars from the main line up the Shannon switch?

Mr. SEABURY.—We object to the intention with which the signal was placed there.

Mr. McFARLAND.—I will substitute the word purpose.

[432] Mr. SEABURY.—We make the same objection.

The COURT.—He may answer.

Mr. SEABURY.—We except.

The WITNESS.—The block signal was not put in

(Testimony of Paul Reissinger.)

on that account at all.

(By Mr. McFARLAND.)

Q. Explain to the jury what the block signal is.

Mr. SEABURY.—We object to the question as not proper redirect.

The COURT.—Is this something you omitted to call out before?

Mr. McFARLAND.—It is something that they brought out—the inference that this block signal was put in in reference to this accident.

The COURT.—Your purpose is to negative the inference that this accident had something to do with the installation of the block signal?

Mr. McFARLAND.—Yes, sir.

The COURT.—I understood him to say—understood that he had already answered it.

Mr. KIBBEY.—We would like to have the jury know what the block signal is.

The COURT.—He may do so.

Mr. SEABURY.—We except.

The WITNESS.—This is an automatic block signal that is operated by trains passing over the block district—they make an electric connection between the two rails and throw the semaphore arm which is on a mast at either end of the block district.

(By Mr. KIBBEY.)

Q. Where are those semaphores?

A. The first semaphore on the Clifton end is at the south end of the Clifton yard.

Q. Within sight of the point of this switch?

[433] A. Of which switch?

(Testimony of Paul Reissinger.)

Q. The Shannon switch.

Q. The Shannon switch? A. No, sir.

Q. It couldn't be seen from there? A. No, sir.

Q. Why? A. It is around a curve.

Q. Where is the other semaphore?

A. The other is almost directly in front of Gatti's butcher-shop which is around just about six hundred feet below the Shannon switch.

Q. What operates those semaphores?

A. They are equipped with batteries which furnish the electric current, and then there is a dynamo on each signal.

Q. They are electrically operated by cars running over the track?

A. Yes, sir. The cars break the current.

Q. With cars standing at that switch, would it operate either of the semaphores so the engineer could see them?

A. It would operate both the semaphores, but the engineer could only see the one at the south end which would indicate nothing to them.

Q. It would indicate nothing at all? A. No, sir.
(By Mr. McFARLAND.)

Q. Would that block signal indicate that there was a train between the two points?

A. Yes, but his own train would throw it in that position, so it wouldn't indicate anything to them.

Q. If he was operating the train between those two points he would know he was on the track himself?

A. Yes, sir.

Q. I understand you that it has nothing to do

(Testimony of Paul Reissinger.)

with switching [434] operations of cars at that point?

A. Not a thing. He was down there and if he had paid any attention to the blocks it would have misled him.

Q. What is that?

A. Anybody would be foolish to pay any attention to those blocks in his position, for it would not indicate whether a train was following or not—it was simply operated by his own train.

(Witness excused.)

[Testimony of E. Dawson, for Defendant.]

E. DAWSON, being called as a witness in behalf of the defendant and duly sworn, testifies as follows:

Direct Examination.

(By Mr. McFARLAND.)

Q. Where do you live?

A. Clifton, Arizona.

Q. Give your name first. A. E. Dawson.

Q. How long have you lived in Clifton, Arizona?

A. Four years and two months.

Q. Are you in the employ of the defendant railroad company? A. Yes, sir.

Q. How long have you been in its employ?

F. Four years and two months.

Q. In what capacity?

A. As master mechanic.

Q. Do you know Mr. Clark? A. Yes, sir.

Q. How long have you known him?

A. The same length of time—four years and two months.

(Testimony of E. Dawson.)

Q. Did you see this accident? A. No, sir.

[435] Subsequent to that accident did you have any talk with Mr. Clark? Did you see him?

A. A few days after the accident I did, but I don't know how many days.

Q. Where was he when you saw him?

A. In bed at home.

Q. Were you talking about the accident?

A. Our conversation was principally on the injuries received by him.

Q. What did he say?

A. He complained of his ribs and his hip, saying how sore it was and at times how badly it would hurt him.

Q. Any other injuries except the ribs?

A. No other injuries that I can remember at all.

Q. About how long did you say that was after the accident?

A. As near as I can remember, it would be three or four days after.

Q. At his house? A. Yes, sir.

Q. You say he was in bed? A. In bed.

Q. Was anybody there at that time except you and Mr. Clark?

A. I believe Mrs. Dawson was there, my wife and I, and I believe the nurse.

Q. Now, that is the extent, so far as you remember, of his complaint as to his injuries? A. Yes, sir.

Q. His ribs? A. His ribs and hips.

Q. Did he say anything about any injury to his head? A. No, sir.

(Testimony of E. Dawson.)

[436] Q. Did he say anything about any injury to his eye? A. No, sir.

Q. Did you see any evidence on his face of any injury or violence?

Mr. SEABURY.—We object to that as a conclusion—any evidence of it.

(By Mr. McFARLAND.)

Q. What was the condition of his face when you saw him?

A. The usual appearance except that he had a distressed and pale appearance from his injuries.

Q. Did you notice any scratches or bruises on his face? A. No, sir.

Q. Did he make any complaint to you about his eyes?

Mr. KEARNEY.—We object to the question as leading.

The COURT.—It is leading.

(By Mr. McFARLAND.)

Q. What did he say, if anything, about his eye?

A. Nothing whatever.

Q. What experience, if any, have you had in railroading or in the railroad business?

A. I have been in the employ of railroads about twenty-three years. My total experience in mechanical work is over thirty-six years, but about between twenty-one and twenty-three in connection with the operation of trains through the mechanical department.

Q. Have you any knowledge or experience in the operation of trains on lines of road?

(Testimony of E. Dawson.)

A. Well, as far as the maintenance of locomotives and cars and the handling of them from a mechanical standpoint.

Q. Do you know that part of the defendant's railway running from the Shannon switch to the bridge over the San Francisco river?

[437] A. I am familiar from observation only, having passed over it many times.

Q. I understand you to say you are familiar with the operation of trains on railroads? A. Yes, sir.

Q. From that experience and observation what would you say about cars rolling on that particular part of the roadbed that you have described, without the brakes being set?

Mr. SEABURY.—We object—too vague and indefinite to allow the witness to do anything except make a general discussion of rolling cars. The question is what would you say as to their rolling.

The COURT.—I presume he means whether in his opinion the cars would roll or not.

Mr. SEABURY.—I suppose that is what was intended, and if that is so we object to it on the ground that the undisputed evidence in the case is that cars that were without any brake or block did in fact roll.

The COURT.—You are not attempting to show that they would not roll?

Mr. McFARLAND.—Whether they would or would not roll if left on that part of the track from the Shannon switch to the bridge without the brakes being set.

Mr. SEABURY.—The undisputed evidence is

(Testimony of E. Dawson.)

that they have on a variety of occasions.

Mr. KIBBEY.—Not in a variety of cases.

The COURT.—I don't understand they are attempting to show they did not roll in this instance.

Mr. KIBBEY.—No, whether they probably would roll or not.

The COURT.—I presume you are trying to show by this witness what you showed by another witness—the probability of their [438] rolling?

Mr. KIBBEY.—Yes.

Mr. SEABURY.—We think it is objectionable.

The COURT.—He may answer that question.

Mr. SEABURY.—We except.

The WITNESS.—Part of my duties was to investigate that case.

Mr. McFARLAND.—Please answer the question.

The WITNESS.—Please repeat it.

(By Mr. McFARLAND.)

Q. Whether they would probably roll there if left standing still—of their own motion or volition.

A. From observations that I took—

The COURT.—Just please answer the question. Just say would they or would they not.

The WITNESS.—I think not.

(By Mr. McFARLAND.)

Q. Why do you think so?

Mr. SEABURY.—We object to the question.

The COURT.—I sustain the objection.

(By Mr. McFARLAND.)

Q. Do you know the amount of force it would require to move a loaded car of approximately forty

(Testimony of E. Dawson.)

tons on a level track?

Mr. SEABURY.—We object to the question as assuming a state of facts that has no relation to this case.

The COURT.—It is a scientific inquiry—not a hypothetical question necessarily. You may answer the question.

Mr. SEABURY.—We except.

The WITNESS.—Does that mean to keep it in motion or to start it from a standstill?

Mr. McFARLAND.—To start it from a standstill.

The WITNESS.—Forty tons could be started with a power of [439] six hundred and eighty pounds, or about seventeen pounds to the ton—probably a little over that, but that is a safe figure. Some run it eighteen.

Q. Now, what amount of force or power would it require to start a car standing still loaded approximately with forty tons of freight on a grade of one-quarter of one per cent?

Mr. SEABURY.—We made the same objection.

The COURT.—Objection is overruled.

Mr. SEABURY.—Exception.

The WITNESS.—Is that one-quarter of one per cent up grade or down?

Mr. McFARLAND.—Well, down.

The WITNESS.—I will have to figure that. (Witness figures.) Was forty tons the total weight?

Mr. McFARLAND.—Yes.

The WITNESS.—(After concluding calculations.) Four cars of forty tons each from a stand-

(Testimony of E. Dawson.)

still down a one-quarter of one per cent grade would take nineteen hundred and twenty pounds.

(By Mr. McFARLAND.)

Q. To move it down-grade?

A. Yes—on a perfect track.

Q. Now, on a track that was down-grade one-quarter of one per cent? A. That is the answer.

Q. How much?

A. Nineteen hundred and twenty pounds.

Q. To the ton? A. No, to the total load.

Q. To the total four loads?

A. Yes, sir. I have the weight of those cars that were in this accident.

[440] Q. What is the weight?

A. The total weight of the four cars was three hundred and seventy-five thousand nine hundred pounds, or one hundred and eighty-seven tons and ninety-five one-hundredths.

Q. What would that be to the car?

A. An average of—

Mr. SEABURY.—Now, we object to the witness reading from a memorandum-book—there is no question about refreshment of the recollection—simply reading out of a memorandum-book. That doesn't constitute evidence. We ask that his answer be stricken out as appearing that he is reading from a memorandum-book.

The COURT.—Strictly speaking that objection is good.

(By Mr. McFARLAND.)

Q. Can you state that fact from your memory?

(Testimony of E. Dawson.)

A. I took those figures from the record in the superintendent's office given in there by the conductor the day previous to the wreck—the conductor on the train that brought these cars in.

Mr. SEABURY.—We move that it be stricken out on the ground that the evidence is only hearsay and as such inadmissible.

The COURT.—Oh, yes, but I doubt—the cars must have weighed something—probably approximately that. What difference does it make whether a few more pounds more or less?

Mr. SEABURY.—I don't suppose there is any objection, your Honor.

The COURT.—Yet the objection is technically good.

Mr. McFARLAND.—The answer may stand.

The COURT.—Yes.

(By Mr. McFARLAND.)

Q. Do you know the method adopted by standard railway companies [441] in switching cars in their yards?

Mr. SEABURY.—We object to the question as immaterial whether he knows or not.

The COURT.—The question is sustained to that.

(By Mr. McFARLAND.)

Q. Do you know the methods pursued by standard railway companies in leaving cars standing upon their tracks? A. Yes, sir.

Mr. SEABURY.—We make the same objection—immaterial whether he knows such fact or not, ask that the answer be stricken out.

(Testimony of E. Dawson.)

The COURT.—The purpose is to show the same thing?

Mr. McFARLAND.—The purpose is to show the methods adopted by railroads generally in leaving cars standing upon tracks with the brakes set or not.

The COURT.—I sustain the objection.

(By Mr. McFARLAND.)

Q. Do you know as a matter of fact whether standard railway companies leave their cars in their switching operations without brakes being set on their line of railway where the grade is one-quarter of one per cent or less?

Mr. SEABURY.—We make the same objection.

The COURT.—The same ruling.

(By Mr. McFARLAND.)

Q. Do you know whether it would be the reasonably safe operation of the defendant in the operation of the defendants' cars and switching on its lines of railway between the Shannon switch and the San Francisco bridge to leave cars on that line without brakes being set?

Mr. SEABURY.—We make the same objection.

The COURT.—The same ruling.

Mr. McFARLAND.—Mr. Reporter please note our exceptions to [442] each one of those rulings.

(To the witness.)

Q. Do you know on what grade four cars loaded approximately with forty tons of merchandise would stand after having been brought to a full stop without the brakes being set?

A. They will stand on a grade as high as—just

(Testimony of E. Dawson.)

barely one and a quarter per cent on perfect track.

Q. One and one-quarter per cent? A. Yes, sir.

(By Mr. KIBBEY.)

Q. You examined those cars involved in that accident? A. Yes, sir.

Q. What is the width of that car that came in collision with the cab?

A. It would be about nine feet nine or eight—that is the general—

Mr. KIBBEY.—You have answered.

Mr. SEABURY.—Did you measure that particular car?

The WITNESS.—No, sir.

Mr. KIBBEY.—That is your information as to the width of that car?

The WITNESS.—Yes, sir.

Mr. McFARLAND.—You didn't measure it?

The WITNESS.—No, sir.

Mr. McFARLAND.—That is all.

(Witness excused.)

Mr. KIBBEY.—We would like to recall Mr. Bond for one question.

The COURT.—Very well.

[Testimony of **R. C. Bond**, for Defendant
(Recalled).]

R. C. BOND, being recalled as a witness in behalf of the defendant and having been heretofore duly sworn in this case, testifies further as follows:

[443] (By Mr. KIBBEY.)

Q. Mr. Bond, assuming that the cab of that engine was ten feet one inch wide, and the car with which it

(Testimony of R. C. Bond.)

came into collision is nine feet six inches wide, at what distance from the frog must the *collision occurred*?

Mr. SEABURY.—We object to the question as incompetent, not being a proper subject for expert testimony.

The COURT.—I don't see clearly how that may be.

Mr. KIBBEY.—It is a matter that your Honor can figure—it is a matter that any of the jury can figure if you are expert enough on figuring—a mere matter of calculation. Here is what I am trying to show—those cars wouldn't have collided on the frog.

The COURT.—Of course, if the two tracks were sufficiently far apart they never would collide.

Mr. KIBBEY.—But if operated at an angle to each other, now, there was some distance at which that angle there—that they would come into collision on account of the overhang of the car. I want him simply to give me that figure. It is a mere mathematical proposition. They couldn't collide on the frog.

The COURT.—They could collide, but they couldn't collide in the manner these did. They might collide end to end.

Mr. KIBBEY.—Yes, but not as in this case. It is a mere matter of computation.

The COURT.—Can't it be calculated mathematically?

Mr. SEABURY.—I don't see what we need an expert for. The undisputed evidence is that they did collide.

The COURT.—The question is how far that engine moved after the signal was given. It is proper

(Testimony of R. C. Bond.)

to show where the collision occurred. I think though that there is direct testimony on that subject. However, you may answer the question.

[444] Mr. SEABURY.—We except to the ruling of the Court.

(By Mr. KIBBEY.)

Q. How far, Mr. Bond? A. Forty-six feet.

Q. In what direction from the frog?

A. South from the frog.

Mr. KIBBEY.—That is all.

(Witness excused.)

[445] Mr. McFARLAND.—If the Court please, we offer the deposition of Dr. Dietrich.

Mr. SEABURY.—We object to the offer in gross. This deposition was taken under a stipulation which expressly reserved all objections to the questions and answers the same as if the witness were personally present.

The COURT.—Who is Dr. Dietrich?

Mr. SEABURY.—He was the attending physician.

The COURT.—On what do you base your objection?

Mr. SEABURY.—We object to the offer in gross on the ground that the deposition was taken under stipulation and not in the usual course, and that the stipulation expressly reserved—

The COURT.—I understand, but what do you wish to object to now?

Mr. SEABURY.—We wish them to read such portions of it as they desire.

The COURT.—I thought that you objected to it in gross.

Mr. SEABURY.—I only objected to the offer in gross, if your Honor please.

The COURT.—Oh, very well.

[Deposition of Dr. Henry Dietrich, for Defendant.]

Thereupon defendant's counsel reads from the deposition of Dr. Dietrich, reading the interrogatories and answers from number one to number nine, inclusive, without objection on the part of plaintiff's counsel, as follows:

Q. 1. What is your full name?

[446] A. Henry Dietrich.

Q. 2. What is your business?

A. Physician and surgeon.

Q. 3. If you say physician and surgeon, please state how long you have been in the practice of medicine and surgery and what place you have practiced your profession.

A. Since 1898. Chicago, 1898–1900; Wardner, Idaho, 1900–1902; Morenci, Arizona, 1902–1906; Clifton, Arizona, 1906–1911.

Q. 4. State what medical college or colleges you attended and if you have diplomas from same.

A. Northwestern University Medical College, and Rush Medical College, Chicago; Diploma from Rush Medical College and Presbyterian Hospital, Chicago; Post-graduate study, Berne, Switzerland, 1906.

Q. 5. What experience have you had in surgery and at what place?

A. House physician and surgeon, Presbyterian

(Deposition of Dr. Henry Dietrich.)

Hospital, Chicago, 1898–1900; assistant surgeon, Warden Hospital, Wardner, Idaho, 1900–1902, surgeon Longfellow Hospital, Morenci, Arizona, 1902–1906; chief surgeon Clifton Accident Benevolent Association Hospital, 1906–1911.

Q. 6. State the time covered in each place and the class or classes of cases in which you have had surgical experience.

A. Time as given under interrogatory 5. My experience covered the field of general surgery; it was not limited to any class of cases.

[447] Q. 7. Did you ever reside in the town of Clifton, Greenlee County, (formerly Graham), State of Arizona? A. Yes.

Q. 8. If you say you did, state the time covered by this residence. A. 1906–1911.

Q. 9. If you say that you did at one time live in Clifton, state if you can, the time that you left and where you have been since and what has been your business since you left.

A. I left in August, 1911. Went to Chicago and sailed for Europe in September, 1911. From October 1 to March 30, resided at Berlin, Germany, and from April 1st to date at Zurich, Switzerland. In both places I have been doing post-graduate medical work, principally on diseases of children.

Q. 10. State the object of your leaving, what you have been doing since you left and what you are now doing.

Mr. SEABURY.—We object to the statement of the object, although I don't think that it is material.

(Deposition of Dr. Henry Dietrich.)

The COURT.—You may read the answer.

A. To do post-graduate medical work. I have been working in hospitals and am now doing so.

Q. 11. State when you will return.

A. I do not know.

Q. 12. If you say that you will return, at what place do you expect to locate?

A. I have not chosen a location. Some large city.

[448] Q. 13. State whether you were ever connected in any capacity with the Arizona and New Mexico Railway Company, whose principal place of business is in Clifton, Arizona. A. Yes.

Q. 14. If you say that you were connected with this company, state in what capacity.

A. Chief surgeon of medical department.

Q. 15. If you say with the medical department of this railway company, please state what position you occupied in the medical department and how long.

A. Chief surgeon since 1906.

Q. 16. If you say that your position was that of chief surgeon with this company, state when this relation commenced and how long it existed.

A. From 1906 until August 1st, 1911.

Q. 17. Do you know one Thomas P. Clark?

A. Yes.

Q. 18. If you say that you do, state how long you have known him, what position if any he occupied in the service of the Arizona and New Mexico Railway Company.

A. Since 1906. Locomotive engineer.

Q. 19. If you know, please state how long he was

(Deposition of Dr. Henry Dietrich.)

in the service of the company and in what position.

A. I cannot state the exact number of years he was employed.

Q. 20. If you say in answer that you do know Mr. Clark, and that he occupied the position of engineer in this company, [449] state how long he was in this service as engineer.

A. I cannot say how long he was employed as engineer.

Q. 21. Do you know anything of an accident to Mr. Clark on or about the 15th day of March, 1911?

A. Yes.

Q. 22. If you say that you do, please state whether or not you saw Mr. Clark on that date, if not on that date, state when you first saw him after the accident.

A. I am under the impression it was Thursday, March 16th. I saw him on the day of the accident about 10 o'clock A. M.

Q. 23. If you say that you did see him on the date of the accident or some date subsequent thereto, please state whether you examined Mr. Clark with reference to any injury he received on that occasion.

A. I did.

Q. 24. Describe particularly, if you can, the exact condition of Mr. Clark in respect to injury or injuries as you found them on the date of your examination.

Mr. SEABURY.—We object on the ground that it appears from the examination of this witness that he is incompetent to testify concerning the injuries received by Mr. Clark, under paragraph 2535 Revised Statutes of Arizona, 1901.

(Deposition of Dr. Henry Dietrich.)

The COURT.—Yes.

Mr. KIBBEY.—It is not apparent that Mr. Clark was a patient of his.

[450] The COURT.—Isn't it apparent that he visited Mr. Clark to make the examination as a physician?

Mr. KIBBEY.—He might even do that.

The COURT.—Not if he was a physician and in charge of the case.

Mr. KIBBEY.—There is no evidence of that.

The COURT.—That will have to appear before the evidence can go in, that he was not.

Mr. KIBBEY.—The presumption does not follow that he was, although the fact is that he was.

The COURT.—The evidence is already in that he was the physician in charge of the case. Mr. Clark said Dr. Dietrich called upon him. The objection is sustained.

Mr. KIBBEY.—We desire to except to the ruling of the Court.

Q. 25. Please state whether or not you treated Mr. Clark as physician or surgeon for the injuries you have described. A. I did.

Q. 26. If you say that you did, when did this treatment begin and when did it end?

Mr. SEABURY.—We object to that as within the scope of the objection already pointed out.

The COURT.—Yes.

Mr. KIBBEY.—By admitting the other questions hasn't he waived his objection to subsequent questions along the same lines?

(Deposition of Dr. Henry Dietrich.)

The COURT.—They can waive all of it or any part of it. [451] They have a right to object to any portion that you see fit to offer. It is within the province of the plaintiff to waive the privileged nature of the communication.

Mr. McFARLAND.—The position we take is that by crossing these interrogatories and permitting the witness to be examined without objection, that they waived that right.

The COURT.—My understanding was that the stipulation expressly reserved that.

Mr. McFARLAND.—Not what they stipulated to do, but what they did do—that they went on and asked a number of questions—thirty or forty cross-interrogatories—and they were answered by Dr. Dietrich. Now it seems to me that the position that the plaintiff would be in in respect to depositions taken before an officer would be the same as though the witness were present in court. They have the right to object to them, but they didn't do it. The stipulation would be equivalent to the legal proposition that they could permit or waive it.

The COURT.—Where is the stipulation?

Mr. SEABURY.—(Handing the stipulation to the Court.) That is as to the original deposition. Of course we were obliged absolutely to take the cross-examination at that time, and our stipulation went to the objections at this time.

[452] The stipulation is as follows:

*In the District Court of the United States for the
District of Arizona.*

THOMAS P. CLARK,

Plaintiff,

vs.

THE ARIZONA & NEW MEXICO RAILWAY
COMPANY, a Corporation,

Defendant.

STIPULATION.

It is hereby stipulated and agreed by and between the parties plaintiff and defendant in this action, that the deposition of Dr. Henry Dietrich, a witness on behalf of the defendant, be taken before any person authorized to take depositions as provided for and designated under the provisions of subdivision 3 of Section 2515 of the Revised Statutes of Arizona, 1901, in any part of the world; that the direct and cross-interrogatories hereto attached shall go out with this stipulation, and the same propounded to said witness, and hereby waiving the issuance of any commission; that the deposition of said witness when so taken and returned may be read in evidence in this cause subject to the same objections and exceptions, as if said witness were personally present on the stand; that said deposition when so taken shall be certified to by the officer taking the same, and shall be inclosed in an envelope addressed to the Clerk of the United States District Court, at Phoenix, Ari-

(Deposition of Dr. Henry Dietrich.)

zona, U. S. A. This deposition may be used by either party to this cause.

Dated April 1st, 1912.

McFARLAND & HAMPTON,

Attorneys for the Defendant.

L. KEARNEY,

Attorney for the Plaintiff.

[453] The COURT.—(After reading the stipulation.) I think the stipulation covers—reserved the right to object.

Mr. McFARLAND.—I think that is true, but I think it is a privilege that he might exercise or might not at his direction.

The COURT.—At this time, I think.

Mr. McFARLAND.—Please note our exceptions.

Q. 27. State where Mr. Clark was during the period covered by this treatment.

Mr. SEABURY.—We urge the same objection.

The COURT.—Same ruling.

Mr. McFARLAND.—Exception.

Q. 28. If you say that you found on your examination, injuries to his ribs, state on which side the injuries were to the ribs, the number of ribs involved and the result of the treatment in this respect. (Same objection—same ruling—exception.)

Q. 30. If you say there were any injuries to the kidneys or either of them, state the result of your treatment. (Same objection—same ruling—exception.)

Q. 31. If you say there were bruises over the sacra-iliac joint, state the condition in this respect

(Deposition of Dr. Henry Dietrich.)

and the result of your treatment. (Same objection—same ruling—exception.)

Q. 32. You may state in detail, if you know the exact condition you found Mr. Clark in when you first examined him or treated him for the several injuries you have described and the result of this treatment. (Same objection—same ruling— [454] exception.)

Q. 33. If you examined his urine on the date of your first examination, you may state what you found in this respect, and the condition of his urine during the time covered by your treatment. (Same objection—same ruling—exception.)

Q. 34. State his temperature on the date of your first examination and during the time covered by your treatment. (Same objection—same ruling—exception.)

Q. 35. State whether you examined his pulse at the date of your first examination and during your treatment of him, and if there were any indications of any disease or affliction of Mr. Clark other than those in reference to the injuries you have described. (Same objection—same ruling—exception.)

Q. 36. State whether you examined his lungs at the date of your first examination and what were their condition. (Same objection—same ruling—exception.)

Q. 37. State, if you know, if there were any indications of pneumonia in either of his lungs at the time you first examined them, or at any time covered

(Deposition of Dr. Henry Dietrich.)

by your treatment. (Same objection—same ruling—exception.)

Q. 38. If you say there were, state whether you treated him in this respect and the result of your treatment. (Same objection—same ruling—exception.)

Q. 39. If you say that you examined Mr. Clark at the date of the accident or afterwards, state whether there were any marks of violence or bruises on his head, face or eyes or [455] either of them. (Same objection—same ruling—exception.)

Q. 40. State whether at the time of your first examination, or afterwards during your treatment of him, he made any complaint or called your attention in any way to any trouble with his eyes or either of them.

Mr. SEABURY.—We object.

The COURT.—Same ruling.

Mr. KIBBEY.—Just a minute. Please read that question again. (Counsel reads the question.) We think that is competent, and made so by the testimony of Mr. Clark.

The COURT.—I don't think that changes the rule. It is not a question of whether it is contradictory in its nature or not, but it covers the whole subject matter.

Mr. KIBBEY.—It takes away from it the nature of privilege.

The COURT.—I think not, under the rule. My understanding is that the whole matter is privileged whether there are thirty people present or not.

(Deposition of Dr. Henry Dietrich.)

Mr. KIBBEY.—The books state otherwise. If it is made in the presence of a number of people it shows that the patient doesn't care.

The COURT.—I think it covers the whole matter of communication as well as examinations, treatment, what he may have discovered, no matter if there be other sources of knowledge upon the same matter or not.

Mr. KIBBEY.—This is directed to a communication or lack of communication.

The COURT.—That is especially excepted.

[456] Mr. KIBBEY.—We take exception.

Q. 41. If you say he did, please state if you treated his eyes or either of them and the result of this treatment. (Same objection—same ruling—exception.)

Q. 42. If you say in answer to the above interrogatory that he complained of his eyes or loss of sight of his eyes or either of them, state whether you treated him for any trouble of his eyes and particularly with reference to the loss of vision of his eyes or either of them. (Same objection—same ruling—exception.)

Q. 43. Please state whether or not at the first examination you made of Mr. Clark or at any time subsequently during your treatment of him, did you discover any trouble with his eyes or either of them, or whether he ever complained during the time covered by your treatment, of any defect or loss of vision of his eyes or either of them. (Same objection—same ruling—exception.)

(Deposition of Dr. Henry Dietrich.)

Q. 44. State if at any time covered by your treatment of Mr. Clark for the injuries received, either during your treatment of them or at any time subsequent, did he complain of any trouble with his eyes or any defect or loss of vision of his eyes or either of them. (Same objection—same ruling—exception.)

Q. 45. If you say that he did, at a subsequent date, please state that date as near as you can remember. (Same objection—same ruling—exception.)

[457] Q. 46. If you state that Mr. Clark occupied quarters at his home in Clifton during your treatment of him for the injuries received in this accident, state whether during that treatment he used his eyes in reading while confined to his home. (Same objection—same ruling—exception.)

Q. 47. If you say he did, state the extent to which he used his eyes in this respect or otherwise. (Same objection—same ruling—exception.)

Q. 48. State whether during this time he made any complaint or called your attention to any defect or loss of vision of his eyes or either of them. (Same objection—same ruling—exception.)

Q. 49. You may state in a general way or in detail any fact or circumstance connected with your treatment of Mr. Clark for injuries received as a result of this accident and particularly in reference to any trouble with his eyes or loss of vision while under your care as a patient, that you may consider proper or necessary in order to get at the facts in this case, as though you were especially interrogated

(Deposition of Dr. Henry Dietrich.)

in respect to same. (Same objection—same ruling—exception.) And this concluded the reading of the direct interrogatories.

Mr. SEABURY.—We offer no cross-examination, and we expressly offer no cross-examination in view of the Court's ruling.

[Testimony of Dr. H. H. Stark, for Defendant.]

[458] Dr. H. H. STARK, being called as a witness in behalf of the defendant and duly sworn, testifies as follows:

Direct Examination.

(By Mr. KIBBEY.)

Q. What is your name? A. Dr. H. H. Stark.

Q. Where do you reside? A. El Paso, Texas.

Q. What is your business?

A. Physician and surgeon.

Q. How long have you been engaged in the practice? A. Sixteen years.

Q. And where?

A. St. Louis and El Paso—two years in St. Louis and [459] fourteen years in El Paso.

Q. Are you a graduate of any medical college?

A. I am a graduate of the medical department of St. Louis University.

Q. Have you had any other educational opportunities?

A. Yes, I had a certificate of work with the university of Vienna, the university of Prague, and the Royal London Ophthalmic in London.

(Testimony of Dr. H. H. Stark.)

Q. Have you made any special department of medicine or surgery your business?

A. Eye and ear work.

Q. For what length of time?

A. I have done nothing but that for the last six years.

Q. Do you know the plaintiff in this case, T. P. Clark? A. Yes, sir.

Q. How long have you known him?

A. I have known him since June a year ago.

Q. Where did you see him? A. At Clifton.

Q. At whose instance did you see him?

A. Mr. A. T. Thompson.

Q. Mr. Thompson was at that time connected with the defendant railway company?

A. Yes, sir. I don't know what his position was at that time—he was the head of it.

Q. He employed you to visit Mr. Clark, did he?

A. Yes, sir.

Q. Where did you see Mr. Clark?

A. In Clifton.

Q. Where in Clifton? A. At the A. C. hospital.

[460] Q. Did you make any examination of him at that time?

A. Yes, sir, I made an examination of his eyes.

Q. State what examination.

Mr. SEABURY.—We object to the question, and ask leave to cross-examine this witness for the purpose of showing the witness' disqualification and incompetency.

The COURT.—Very well.

(Testimony of Dr. H. H. Stark.)

(By Mr. SEABURY.)

Q. You say this examination took place in June, 1911? A. Yes, sir.

Q. At the hospital of the defendant company in Clifton? A. Yes, sir.

Q. Under the direction of Mr. Thompson?

A. Under his personal direction, you mean?

Q. Yes.

A. It was his request I examined him. I came there especially for that purpose.

Q. Did Mr. Thompson or the defendant company conduct the hospital?

A. No, but it is the only place I have to make such examinations.

Q. You wouldn't go there and make an examination simply because Mr. Thompson said so?

A. Yes.

Q. Without consulting the medical force?

A. Yes, sir, if he wanted the case examined, because he is in charge of the whole road.

Q. Now, were you at that time in the employ of the defendant company? A. No, sir.

Q. Did you have any connection or affiliation with its medical department? [461] A. No, sir.

Q. Or with its hospital? A. No, sir.

Q. Did Mr. Thompson pay you any fee?

A. He paid me for the examination.

Q. He did? A. Yes, sir.

Q. How long did the examination take?

A. Why, it probably took—I don't know—probably took a half or three-quarters of an hour.

(Testimony of Dr. H. H. Stark.)

Q. Do you recall what time of day it was?

A. You mean morning or evening?

Q. Yes.

A. No, I don't believe I do. I think it was in the morning, though I am not sure.

Q. Who was present at the time you made the examination?

A. Mrs. Clark was present and—I don't know—you see, the thing is situated this way; people are going in and out of the room all the time, so there might have been other persons present, perhaps Dr. Dietrich might have been present.

Q. Was this in the public ward of the hospital?

A. No, it is in the ex-ray room—the dark room.

Q. In a single room you conducted the examination? A. Yes, sir.

Q. Who was present?

A. Mrs. Clark was present. I had a conversation with her at the time. I know during a large part of the examination there was no one there but Mr. Clark, Mrs. Clark and myself.

Q. In other words, no other doctor was present.

A. Dr. Dietrich might have come in.

Q. Just in and out?

[462] A. I am not positive—I know he wasn't there all the time.

Q. Did he participate in the examination?

A. No, he did not.

Q. Had you met Mr. Clark before that?

A. No, I never had.

Q. Who introduced you to him?

(Testimony of Dr. H. H. Stark.)

A. I don't know—it might have been one of the nurses. I don't know who introduced me. I don't remember. That has been a year and a half ago.

Q. Do you know how you were introduced to him?

A. What do you mean?

Q. I mean how you were introduced to him—in what capacity? A. Me?

Q. Yes. A. No, I don't.

Q. Did you tell him you were a doctor?

A. Yes, I believe I did tell him—most of the introduction was done on my part. I told him I was up there to examine him and he consented to it.

Q. Did you tell him anything about any special employment for the company?

A. I don't remember whether I did or not.

Q. You don't think you did?

A. I don't remember.

Q. Now, Doctor, don't you know, as a matter of fact, that [463] Mr. Clark assumed you were one of the regular physicians of the defendant?

A. I am not able to tell what Mr. Clark assumed.

Q. That is what I asked you. If you don't know, that is the answer. You didn't tell Mr. Clark you were from El Paso?

A. Now, I don't know whether I did or not. I think perhaps Mr. Clark knew it.

Q. How do you think he perhaps knew it?

A. I think in the conversation that occurred that he said he had heard of me.

Q. That was after you had gotten into the examination, wasn't it? A. I don't know when it was.

(Testimony of Dr. H. H. Stark.)

Q. You don't remember? A. No.

Q. What is your best recollection on that subject?
Do you think you discussed El Paso before or after
you began to examine him?

A. I don't remember.

Q. You have no recollection of that?

A. That wasn't the important thing to me.

Q. It might have been of vital consequence to him
as it is now? A. I don't know.

Q. How long did your examination take?

A. Between half an hour and an hour.

[464] Q. Did you derive any information concerning
his condition except at that examination?

A. The condition of his eye?

Q. I mean of his general condition?

A. Only the conversation with him.

Q. Only from conversations with him at that interview?
A. Yes, sir.

Q. That is the extent of your knowledge and acquaintance
of the facts of his case?

A. Of course I knew he was injured before I came
up.

Q. So your only knowledge was derived at that
interview? A. As to the condition of his eye?

Q. Yes. A. Yes, sir.

Q. Did you make any other examination except
as to the condition of his eye?

A. Other than that?

Q. Yes. A. No.

Q. The information which he gave you—was the
information which he gave you necessary to enable

(Testimony of Dr. H. H. Stark.)

you to treat his eye or to properly diagnose his case?

A. No, I think I could have made a diagnosis without him saying anything about it.

Q. You think you could?

A. Yes, you understand that is part of the routine of the examination—questioning a patient.

[465] In other words, that is the only method you have of securing the subjective symptoms.

A. Yes—objective symptoms, of course, we discover ourselves.

Q. So you can say that all the subjective symptoms that you discovered to exist in his case were derived from him on that occasion?

A. Yes, sir, that is right.

Mr. SEABURY.—Now, if your Honor please, I would like to call Mr. Thompson.

The COURT.—Very well.

**[Testimony of A. T. Thompson, for Plaintiff
(Recalled).]**

A. T. THOMPSON, being recalled as a witness by counsel for the plaintiff for examination upon the question of the admissibility of the testimony of the witness Stark, and having been heretofore duly sworn in this case, testifies further as follows:

(By Mr. SEABURY.)

Q. Mr. Thompson, Dr. Stark has testified that you requested him to call and examine the plaintiff. Had you ever secured any consent from the plaintiff to permit Dr. Stark to examine him?

A. No, sir.

Q. Do you know whether Mr. Clark knew that

(Testimony of A. T. Thompson.)

Dr. Stark was not one of the regularly employed physicians of the defendant?

A. I don't know what he knew.

Q. You do not. Dr. Stark testified that you compensated him for his attendance upon Mr. Clark on this occasion. He didn't [466] mean that you compensated him out of your own pocket?

A. No, sir.

Q. You did not so compensate him?

A. No, sir.

Q. Isn't it a fact that you compensated him out of the funds of the defendant? A. Yes, sir.

Q. Isn't it a fact that the funds came from the hospital fund to which the plaintiff among others contributed? A. No, sir.

Q. From what fund did it come?

A. That was charged direct against the Arizona and New Mexico Railway, for it was in the nature of a special fee and wasn't subject to the society's funds.

Q. Isn't it a fact that the defendant maintains a so-called medical department or hospital?

A. Yes, sir, it did at that time.

Q. Will you please tell us what the privileges to workmen in the employ of the defendant included with reference to medical attention in such department?

A. It included every medical attention—every care in the hospital in case of injury.

Q. Every medical attention and all the facilities of the hospital? A. Yes, sir.

(Testimony of A. T. Thompson.)

Q. That includes, of course, the diagnosis of a man's [467] injuries at the company's hospital?

A. Oh, yes.

Q. And there was no limitation or restriction, was there, as to the kind of medical attention which the company was to accord the injured employee?

A. No, there was no limitation, if I understand you right.

Q. No difference between a general and a specially employed doctor?

A. It is a recognized thing that the company has its own physicians and surgeons, and these are the men that attend to any patients—company patients—who may go into the hospital and who are entitled under the fees they have paid into the society for their attendance.

Q. But the fact is as you have already stated that the defendant did compensate Dr. Stark for his medical attendance upon the plaintiff in this particular instance? A. Yes, sir.

Q. I ask if there was anything that you know of which would disclose or tend to disclose to the plaintiff any difference in Dr. Stark's connection with the defendant and other physicians who were in attendance upon him.

A. I cannot conceive how Mr. Clark would connect Dr. Stark with the society in any way.

Q. It is a fact that the examination took place in the hospital?

A. So the doctor says. I don't know where it took place.

(Testimony of A. T. Thompson.)

[468] Q. Is it the defendant's or the Arizona Copper Company's?

A. It doesn't really belong to the railroad company or the Copper Company. It belongs to the society. (By Mr. KEARNEY.)

Q. Has the society any legal existence as a copartnership or a corporation?

Mr. McFARLAND.—That is a legal conclusion.

Mr. KEARNEY.—Do you know as a matter of fact whether it has articles of incorporation?

The COURT.—What difference does it make?

Mr. KEARNEY.—My information is that it is only separate in name—neither a copartnership nor a corporation.

Mr. McFARLAND.—It is immaterial whether it is a copartnership or a corporation.

The COURT.—I don't think that makes any difference here.

Mr. SEABURY.—I renew the objection already urged. I think we have shown the existence of the relation of patient and physician to have existed between this witness and the plaintiff.

The COURT.—I don't think you have shown the existence of the relation of physician and client. The best that you can say in that behalf is that the plaintiff may have understood that any communication he gave to the doctor that that relation existed. Under the testimony thus far adduced the fact is just otherwise.

Mr. SEABURY.—But, if your Honor please, we claim as a [469] matter of law that when a com-

(Testimony of A. T. Thompson.)

pany undertakes to supply medical treatment to its employees who are injured and actually makes a reduction from the salary or wages of the employees—

The COURT.—I understand all that.

Mr. SEABURY.—That the lips of that physician are absolutely sealed just as though the retainer had been paid by the plaintiff himself.

The COURT.—That is unquestionably true, and on that theory I ruled out the declarations of Dr. Dietrich.

Mr. SEABURY.—We claim further that there is no difference as a matter of law between special employment and a general one.

The COURT.—I understand this examination was in reference to this law suit.

Mr. SEABURY.—There is no testimony to that effect.

The COURT.—The inference is quite plain from this evidence that this examination was not for the purpose of treatment at all.

Mr. SEABURY.—I don't know what the purpose of it was.

The COURT.—If it was, of course, then, that ends it.

Mr. SEABURY.—Suppose it was for the purpose of negotiating a settlement, it would be improper for us to go into the purpose.

The COURT.—It must be established that he was Mr. Clark's physician.

Mr. SEABURY.—We admit that, but we think

(Testimony of A. T. Thompson.)

that under these circumstances he has the right to claim it.

Q. You don't think from Mr. Thompson's statement that the [470] employment of the doctor was under that society arrangement, whatever that was? He stated quite the contrary.

Mr. SEABURY.—I think it was a special arrangement, undoubtedly. He has testified the remuneration did not come out of that special fund, but I don't think that would change the course of conduct of the defendant.

The COURT.—The thing in my mind is simply this: Whether the relation which the doctor sustained was made quite clear or whether the plaintiff knew or whether from the circumstances he had a good reason—was put upon notice—that the doctor was not there as his physician in any capacity representing the society or anybody else.

Mr. SEABURY.—Then the surrounding circumstances do have a bearing for the purpose of this inquiry, whether the relation did exist. That is what I had in mind when we showed all the surrounding circumstances. He examined him under the same circumstances as he might have been previously examined under in the hospital under a doctor of the association.

The COURT.—It doesn't make any difference where it occurred, in his house or elsewhere. If he was there as a hostile witness to get information—not for his benefit, but for somebody else's benefit, and if the plaintiff understood that at that time, he

(Testimony of A. T. Thompson.)

certainly—the communication, whatever it was, was certainly not privileged.

Mr. SEABURY.—May I ask if the plaintiff understood that there was no difference between this doctor and Dr. Dietrich, for example? Would that affect the Court?

[471] The COURT.—I am inclined to think so. The only thing is whether the circumstances were such as to put Clark upon notice. If he permitted this examination and made statements under the impression and belief that this doctor was there in his interest as his physician, it is privileged in my judgment—whether the fact be one thing or another—it is the attitude which the plaintiff had in the matter.

Mr. SEABURY.—May I call the plaintiff to ascertain what he understood in this matter?

The COURT.—Yes.

**[Testimony of Thomas Clark, Recalled in His Own
Behalf.]**

THOMAS P. CLARK, the plaintiff, being recalled as a witness by counsel for the plaintiff upon the question of the admission of the testimony of the witness Stark, and having been heretofore duly sworn in this case, testifies further as follows:

(By Mr. SEABURY.)

Q. Mr. Clark, do you remember the day Dr. Stark examined you?

A. I remember him examining me very well.

Q. Had you ever seen him before that?

A. No, sir.

Q. Had you been examined by any other doctors of the defendant in the same place? A. No, sir.

(Testimony of Thomas P. Clark.)

Q. You never had? A. No.

[472] Q. You knew, however, that that was the hospital? A. Yes, sir.

Q. Did you know where the hospital was and what it was? A. Yes, sir.

Q. Tell us what the hospital was where you were examined. A. They call it the A. C. Hospital.

Q. Is that, or is it not, the hospital in which injured employees of the defendant are examined?

A. Yes, sir.

Q. Did you know that to be the fact at the time of your examination? A. Yes, sir.

Q. Who was it that requested you to be examined, if anyone, by Dr. Stark?

A. I think it was Dr. Dietrich.

Q. You think Dr. Dietrich suggested it?

A. Yes, sir. He told me when he would be there.

Q. Was anything said to you with reference to the purpose for which that examination was requested or required? A. To examine my eye.

Q. Dr. Dietrich was then in attendance upon you as your physician?

A. I was still under his charge.

Q. Now, did you think this examination by Dr. Stark was to be made for the benefit of the company or for your benefit? [473] A. I don't know.

Q. You don't know for whose benefit it was to be made? A. For my benefit, I suppose.

Q. Is that what you understood? A. Yes.

Q. Did you or did you not believe that Dr. Stark was in consultation with Dr. Dietrich your attending

(Testimony of Thomas P. Clark.)

physician? A. Yes, sir.

Mr. KIBBEY.—You are leading him right along.

The COURT.—I think the communication is privileged—I will sustain the objection.

(By Mr. KIBBEY.)

Q. You say Dr. Dietrich was there?

A. He might have been in and out.

Q. As a matter of fact, he wasn't in town, was he?

A. Yes, sir, I think so.

Q. You had a conversation with Dr. Stark, didn't you? A. Yes, sir.

Q. In the course of that conversation did you state to Mr. Stark that you found on the third day after the injury that you had lost the vision of your eye?

Mr. SEABURY.—We object to the question.

The COURT.—I sustain the objection.

(By Mr. KIBBEY.)

Q. Didn't you state to Dr. Stark that you had not had any injury to your head—received any injury to your head in that accident?

[474] Mr. SEABURY.—We make the same objection.

The COURT.—Same ruling.

(By Mr. KIBBEY.)

Q. Had you and the company had any talk prior to that time with reference to your condition—your ability to go to work or anything of that kind?

Mr. SEABURY.—We object.

The COURT.—Is this a general examination—isn't it as to this matter of the competency of this doctor?

(Testimony of Thomas P. Clark.)

Mr. KIBBEY.—I am trying to get to the matter of the competency of this doctor.

Mr. SEABURY.—The question is did you have any talk with the company. I don't see what—

The COURT.—You may answer.

The WITNESS.—No, sir.

(By Mr. KIBBEY.)

Q. You had not had any talk with any of them up to that time? A. No, sir.

Q. Didn't you know that the company desired for its own information to have an independent doctor make an examination of your eye?

A. I told Dr. Dietrich about it and he made the appointment with the doctor, I suppose.

Q. Didn't Dr. Dietrich tell you the company wanted an examination made for their information as to your condition [475] and didn't you so understand it?

Mr. KEARNEY.—We object to that as a privileged communication.

The COURT.—I overrule the objection.

The WITNESS.—I told Dr. Dietrich about it and he tried to examine it himself, and then he made the date with Dr. Stark a few days afterwards.

Q. Didn't you understand it was for the information of the company, to find out what the condition of your eye was?

A. I supposed that was the object—very likely.

Q. You understood when the examination was made that it was for the purpose of getting information for the company? A. Yes.

(Testimony of Thomas P. Clark.)

Mr. KIBBEY.—Now, we think it is competent.

The COURT.—That answer is contradictory to the other.

Mr. SEABURY.—Absolutely, your Honor.

Mr. KIBBEY.—Yes, it is.

Mr. SEABURY.—However, we also claim that his direct examination shows much more facts and circumstances in connection with the matter than the mere answer to that one question, and I think from the witness' testimony both under cross and direct examination, that it is perfectly clear that he thought Dr. Dietrich called Dr. Stark as a consulting physician.

Mr. KIBBEY.—I think it is quite obvious to the contrary.

[476] Mr. SEABURY.—We differ in regard to the inferences to be drawn from the evidence. I don't see how the witness can really know—

The COURT.—I will put a question.

(To the witness.)

Q. What did you understand was the object of this examination of your eyes?

A. To know whether it was injured or not.

Q. What difference did it make whether it was injured or not in your judgment?

A. It would make a whole lot.

Q. In what way?

A. From good sight to blindness—I wanted that information.

Q. Who wanted it? A. I did.

Q. You wanted it?

(Testimony of Thomas P. Clark.)

A. I wanted to know the condition of it. When I reported to Dr. Dietrich he said they had no oculist and that they would get one, and then I left the thing to Dr. Dietrich, and when they made the appointment, I appeared there.

Mr. SEABURY.—We think that makes it too clear, your Honor.

The COURT.—I think so.

[477] (By Mr. KIBBEY.)

Q. Did you know that Dr. Stark did not belong to the society's corps of physicians? A. To what?

Q. To the society's staff.

A. No, I didn't know anything about it.

Q. Had you ever seen him before?

A. Not that I know of.

Q. Did you ever hear of his attending anyone else there before?

A. You say Dr. Dietrich or Dr. Stark?

Q. Dr. Stark. A. I never heard of him at all.

Q. Had you heard of him before? A. No, sir.

Q. You knew he came from El Paso?

A. I heard that.

Q. You heard that before?

A. I heard it at the examination. Dr. Dietrich said he would have their man.

Mr. KIBBEY.—That is all.

(Witness excused.)

[478] Mr. KIBBEY.—Shall we make a statement of what we desire to prove by Dr. Stark? We have to get it into the record in some way.

Mr. SEABURY.—Will it not be enough to show

they wished to examine Dr. Stark with reference to the condition he found to exist?

Mr. KIBBEY.—And what that condition was and the inferences from it.

The COURT.—You expect to show that that condition was different from the condition as shown by the testimony adduced on behalf of the plaintiff himself, and contrary to the inferences to be drawn from the testimony of the witnesses for the plaintiff?

Mr. KIBBEY.—Yes.

The COURT.—The objection is sustained on the ground that the communications and the examination was of a privileged character and comes within the rule.

Mr. KIBBEY.—We except to the ruling of the Court.

(Mr. Kibbey thereupon stated to the Court that the defense proposed to prove by the witness Dr. Stark, and avowed that said witness would testify that at the time mentioned he examined the eye of the plaintiff and from his examination he discovered a condition that indicated that the blindness of the plaintiff had existed long prior to the date of the alleged injury; that he found that the optic nerve was atrophied, and other physical conditions from which the conclusion that the cause of his blindness existed long anterior to his accident is inevitable. Counsel further stated that upon this testimony of Dr. Stark the [479] defense further desired to frame hypothetical questions to be submitted to Doctors Goodrich and Smith, who were present, and further avowed

that said witnesses would further testify that the existence of the conditions of the eye that Dr. Stark found led to the same conclusion.

Thereupon Mr. Seabury, in behalf of the plaintiff, stated that if Doctors Goodrich and Smith, or either of them, were called as witnesses, he would show by cross-examination that they each sustained the same confidential relation as existed between Dr. Stark and the plaintiff, and that they would be shown to be incompetent to testify as to any fact or facts coming within their knowledge by reason of said relation, their testimony in relation thereto being of a privileged nature, defendant's counsel conceding that all the information acquired by Doctors Goodrich and Smith of plaintiff's physical condition was acquired from plaintiff by communication or personal examination of him during the existence of the relation of physician and patient between each of said physicians and said plaintiff, and that such information was necessary to enable each of such physicians to prescribe and treat the plaintiff professionally.)

**[Testimony of A. T. Thompson, for Defendant
(Recalled).]**

A. T. THOMPSON, recalled as a witness on behalf of the defendant and having been heretofore duly sworn in this case, testifies further as follows:

Direct Examination.

(By Mr. KIBBEY.)

Q. I understand this hospital association is a separate and distinct concern from either the Arizona Copper Company or the Arizona and New Mex-

(Testimony of A. T. Thompson.)

ico Railway Company? A. Yes, sir.

Q. It is not either operated or managed by them?

A. No, sir.

Q. Now, will you state for what reason you employed Dr. Stark?

The COURT.—I thought we had finished that matter, Judge.

Mr. KIBBEY.—We are trying to struggle out of it.

The COURT.—You wish to renew your offer and to reopen this matter of *voir dire*—that is the purpose?

Mr. KIBBEY.—That is one of them.

The COURT.—When the Court has ruled and the matter is ended it is unusual to proceed as if the matter is still open. Of course it is within the discretion of the Court to permit that to be reopened—examination on *voir dire*—and if that is your purpose you may do so.

Mr. KIBBEY.—That is our purpose.

The COURT.—He has already stated that, however. I don't desire to take up too much time.

[480] Mr. KIBBEY.—I desire just to ask one question on that line.

The COURT.—Very well.

(By Mr. KIBBEY.)

Q. What was the purpose in employing Dr. Stark?

Mr. SEABURY.—We object to the question as immaterial.

The COURT.—It makes no difference unless that

(Testimony of A. T. Thompson.)

purpose was made known to Mr. Clark. I still hold it is privileged.

Mr. KIBBEY.—Very well.

(To the witness.)

Q. Did you see Mr. Clark at any time after the accident, and if so, how recently after the accident did you first see him?

A. I saw Mr. Clark two or three times during April and May. I couldn't give you it any closer—early in May or in April, 1911.

Q. Did you have any conversation with him with reference to his physical condition? A. Yes, sir.

Mr. SEABURY.—We object to the question as having been asked and answered, at least once before. He testified that he offered Mr. Clark work on the slag engine.

The COURT.—I don't think so—not this witness.

Mr. SEABURY.—Very well.

The COURT.—Proceed.

(By Mr. KIBBEY.)

Q. Did you have a conversation with him in reference to his condition? A. Yes, sir.

Q. Where was that conversation?

A. I met him at the depot, I think, and we chatted there on the depot platform.

[481] Q. What was his apparent condition?

A. He was out and walking around and I was surprised he was looking so well.

The COURT.—This witness has testified as to that—he said he inquired of his condition, and so forth.

Mr. KIBBEY.—I think this witness has not been

(Testimony of A. T. Thompson.)

on the stand on that.

Mr. KEARNEY.—It was Dr. Dawson and Mr. Reissinger.

The COURT.—Perhaps you are right about that. Proceed.

(By Mr. KIBBEY.)

Q. What was said in that conversation or any other that you may have had, with reference to his condition? Give all that was said.

A. I can't recall the exact words that passed, but I met Mr. Clark on the platform and shook hands with him and said I was glad to see him out again and asked him how he was feeling, and he told me—expressed the—said that he was feeling glad he had gotten off so light in the accident and thought himself very lucky. He told me that he had his ribs injured—

The COURT.—Did you testify to that this morning?

The WITNESS.—No, sir.

Mr. SEABURY.—I have a distinct recollection to his testifying to exactly the same thing.

The COURT.—Proceed.

Mr. KIBBEY.—Go ahead.

The WITNESS.—And also his hip. We chatted there for a short time and I spoke to Mr. Clark and wanted to know generally what his condition was—like that, in a general way—and also what his idea was about himself, so far as the company was concerned, not with reference to a settlement, but with reference [482] to his employment, and I got the

(Testimony of A. T. Thompson.)

impression from Mr. Clark—

Mr. SEABURY.—We object to his impression.

Mr. KIBBEY.—State substantially what he said.

The WITNESS.—This is substantially what Mr. Clark told me: He expected to be fit for work in a short time then.

(By Mr. KIBBEY.)

Q. Did he in that conversation or any other conversation say anything to you about his vision or any injury to his eye? A. No, sir.

Mr. KIBBEY.—That is all.

Cross-examination.

(By Mr. KEARNEY.)

Q. Didn't you in that same conversation speak about employing him at some future time, and you said, Mr. Clark, you have lost an eye. Didn't you use that expression? A. No, sir.

Q. Then why is it that you were so anxious very soon after that time to employ this specialist and bring him in here?

A. That was later on, Mr. Kearney.

Q. Can you say what day you had any conversation with Mr. Clark about this matter?

A. Not the day.

Q. Will you swear it was in April?

A. I said in April or May. It was prior to Mr. Clark's leaving for El Paso.

Q. Do you know whether or not Mr. Clark left in April or not and went to El Paso?

A. No, I think he left in May.

(Testimony of A. T. Thompson.)

Q. You think, then, that he was in Clifton until May 20th?

A. No, I think it was—I think Mr. Clark was in El Paso around, I think, May 10th or May 13th.

[483] Q. He was in El Paso on that date. But in May he went to El Paso?

A. That is my recollection that he went to El Paso in May.

Q. Now, I ask you if you are willing to make the statement whether or not Mr. Clark was there in Clifton from April 2th to May 10th.

A. No, I am not willing to make that statement. I don't know what date he left.

Q. Then will you deny he was not there—that he was away in El Paso from April 21st until May 21st?

A. That he was in El Paso at all?

Q. In El Paso during that period.

A. I understand he was in El Paso around May 13th. I won't swear to it.

Q. Wasn't he in El Paso up to May 25th?

A. I don't know when he came back.

Q. All this time you were an officer of the company, were you not? A. Yes, sir.

Q. And you have been here ever since this case started—here in Phoenix ever since this case began?

A. Yes, sir.

Q. You had for the company chief management of the case here with the attorneys, haven't you?

A. Here?

Q. Yes. A. No, sir.

Q. Haven't you advised the assistant attorneys all

(Testimony of A. T. Thompson.)

you could in this case? A. Yes, sir.

Q. And you wish to do all you can to defeat this case?

[484] A. Yes, sir. I was employed by the Arizona and New Mexico Railway at the time this accident occurred. I was in charge of the road at that time.

Q. Is it the purpose of your company when an employee sustains an injury—your company does everything to defeat claims of this character?

Mr. KIBBEY.—We object to that. It does with fraudulent claims of this kind.

Mr. SEABURY.—We protest against the response, if the Court please.

The COURT.—Both the question and the response are wholly uncalled for and should be wholly disregarded by the jury.

(By Mr. KIBBEY.)

Q. When did you first hear anything about the injury to his eye?

A. After Mr. Clark got back from El Paso.

(By a JUROR.)

Q. Didn't you state in your evidence that you offered him work and he refused—the other day?

A. No, that question was not asked me.

Mr. KIBBEY.—I think the Court has fallen into a mistake in regard to what Mr. Thompson has testified to. On cross-examination I asked Mr. Clark about a conversation he had with Mr. Clark, and the Court would not permit him to testify at that time—requiring us to reserve the examination until we

(Testimony of A. T. Thompson.)

called him ourselves.

(By Mr. McFARLAND.)

Q. Did you have a conversation with Mr. Clark at a date subsequent to the one you have testified to?

Mr. SEABURY.—We respectfully object to recalling the witness [485] for the purpose of dilating on these conversations.

The COURT.—Which conversation is that?

Mr. SEABURY.—The one with Mr. Clark.

Mr. McFARLAND.—The impression has gotten abroad that there was an offer of a job.

Mr. SEABURY.—May it be confined to that?

The COURT.—Yes.

(By Mr. McFARLAND.)

Q. About how long after the first conversation was it?

A. It was after the first conversation. I am not sure of the month even—I couldn't recall the month without reference to my notes in the case.

Q. What was said of Mr. Clark and what was said by you in that conversation?

A. The object of Mr. Clark's visit to me in that meeting—

Mr. SEABURY.—We object to the witness stating the object of the visit.

Mr. McFARLAND.—Just state what was said by Mr. Clark and by yourself. Where was it, Mr. Thompson?

The WITNESS.—I am trying to condense this in my mind to answer your question so I will just give you the substance. It was quite a long, protracted

(Testimony of A. T. Thompson.)

meeting we had and discussed his condition with reference to employment. To put that in as few words as possible, we explained to him his position with reference to the engine he had been running in the yard; that on account of his condition of not being able to see with one eye we could not put him back safely on that switch engine; that we would consider where we could employ Mr. Clark and give him employment, and we had decided that he could with safety employ Mr. Clark on the slag engine handling the slag between the [486] smelters and the slag dump.

(By Mr. McFARLAND.)

Q. At what wages?

A. The remuneration was the same as he was getting before, namely, one hundred and seventy-five dollars a month.

Q. Did he accept or reject that offer?

A. No, he asked us—he stated that the slag engine might not be a permanent job, which was perfectly true, and I told him that if the slag engine was taken off we would find work for him in the shops—not working at a bench, but some work entirely satisfactory to him, because we had previously discussed with the master mechanic if we could employ Mr. Clark there, and his salary would be the same.

Q. So that he would get one hundred and seventy-five dollars per month for the employment?

A. That was the object.

Q. Did he accept?

A. Mr. Clark said he would take the matter under

(Testimony of A. T. Thompson.)

advisement. That he would like to think it over, and he left. This meeting took place in Mr. Carmichael's office.

Q. Did he come back?

A. Some days later we had a request from Mr. Clark for a further meeting and we had a further meeting with him in my office. He came in and said he had three propositions to submit to me, in which he thought a settlement could be arrived at in his case. I told him that I would be very glad to consider the propositions. He then pulled out of his pocket one sheet of paper which was in letter form, and this was a part of a letter, which part contained his first proposition.

Mr. SEABURY.—We object to any further discussion as to what [487] the propositions were if they involved an offer of compromise.

The COURT.—I sustain the objection.

Mr. McFARLAND.—I want to find out if he finally accepted or rejected the proposition of the slag engine.

The WITNESS.—No, he didn't accept the proposition of the slag engine.

(By Mr. SEABURY.)

Q. Did you in fact ever employ Mr. Clark after this accident? A. No.

Q. You never did? A. No.

Mr. SEABURY.—That is all.

(Witness excused.)

Mr. McFARLAND.—I presume we might save time by offering Dr. Goodrich, a physician and sur-

(Testimony of Thomas P. Clark.)

geon of Morenci, to testify along the same lines as Dr. Stark and Dr. Smith, and that the objections to his testimony will be the same as to the testimony of Dr. Stark and Dr. Smith, and that their testimony has been excluded.

Mr. SEABURY.—That is right—and that we could show the same thing, if permitted.

Mr. McFARLAND.—The defendant rests.

[Testimony of Thomas P. Clark, Recalled in His Own Behalf.]

THOMAS P. CLARK, the plaintiff, being called as a witness in his own behalf, and having been heretofore duly sworn in this case, testifies further as follows:

Direct Examination.

(By Mr. SEABURY.)

Q. Mr. Clark, Mr. Reissinger took the stand this morning and testified to having some conversations with you after the accident. Did you ever have any conversation with Mr. Reissinger [488] after the accident? A. No, sir.

Q. No conversation at all?

A. Only just to bid him the time of day.

Q. You did meet him after the accident, didn't you? A. Yes, sir.

Q. What, if any, conversation did you have with him?

A. Not anything more than he asked my condition and I told him.

Q. Did you ever tell him that you thought you were luckily out of that accident, or anything to that

(Testimony of Thomas P. Clark.)

effect? A. Not a thing.

Q. Did you ever say you were glad to be out of it and that you thought you were lucky to have escaped, or anything to that effect? A. No, sir.

Q. Did you discuss your injuries with him at all?

A. No, not much.

Q. Now, Mr. Thompson has testified that he had conversations with you with reference to your injuries after the accident. A. Yes, sir.

Q. Do you recall how many times you met Mr. Thompson after the accident in which your condition was discussed? A. Probably twice.

Q. Will you tell us what was said between you at that time?

A. I went to his office by appointment. He wanted to know if I was ready to settle, and I told him I wasn't.

Q. I ask you, did the conversation relate only to a settlement of your action against the company?

A. I wanted to get passes to go to California on business and for my health too, and I don't think it was discussed at that [489] time.

Q. You don't think the settlement was discussed?

A. I don't think it was.

Q. The conversation related to your getting passes to go to California for your health? A. Yes, sir.

Q. Did you at any time say to Mr. Thompson that you were well out of the accident and very lucky to have escaped, or anything to that effect?

A. No, sir.

(Testimony of Thomas P. Clark.)

Q. Do you remember his offering you employment on the slag engine? A. Yes, sir.

Q. Tell us what was said in reference to the slag engine.

A. He said he would give me work on the slag engine, but the slag engine wasn't running—the job didn't exist.

Q. Would you have received any pay while the engine was not running?

A. I don't know—I don't think so.

Q. That was not specified?

Mr. BENNETT.—We object to the leading form of the questions.

Mr. SEABURY.—This is in rebuttal.

The COURT.—That doesn't make any difference. He can state what was said as well as the other man—it doesn't require leading questions.

(By Mr. SEABURY.)

Q. Was any other offer of employment made to you by Mr. Thompson or any of the defendants, after the accident?

A. He said I could work in the shops, but I wasn't able to work in the shops.

Q. Did you ever go to work in the shops?

[490] A. No, sir; they didn't ask me to go to work.

Q. Did you receive from the defendant any passes or transportation to California? A. No, sir.

Mr. McFARLAND.—We object to that as irrelevant and immaterial.

(Testimony of Thomas P. Clark.)

The COURT.—The objection is sustained as to that question.

Mr. SEABURY.—We except.

(To the witness.)

Q. Now, Mr. Clark, going back to the day of the accident and the time in which you received the signal to stop, I want to ask you as a railroad man whether you did everything that could be done at that time to stop that car in the shortest possible time.

Mr. McFARLAND.—We object.

The COURT.—I sustain the objection.

Mr. SEABURY.—We except.

The COURT.—That is not rebuttal.

Mr. SEABURY.—The evidence I am endeavoring to rebut is the evidence of three witnesses.

The COURT.—That is part of your main case.

Mr. SEABURY.—As to what he did?

The COURT.—Yes, hence it would not be rebuttal.

Mr. SEABURY.—But the defense showed or attempted to show that the car could have been stopped.

The COURT.—That was in answer to what you said.

Mr. SEABURY.—Very well, your Honor; that is all, Mr. Clark.

Cross-examination.

(By Mr. McFARLAND.)

Q. Now, you say, Mr. Clark, that the company did offer you the slag engine? A. Yes, sir.

[491] Q. And you said it was not running?

A. Yes, sir.

Q. And in that conversation didn't Mr. Thomp-

(Testimony of Thomas P. Clark.)

son tell you if it didn't run he would give you other employment? A. Yes, sir.

Q. And that monthly employment either on the slag engine or other employment, would amount to one hundred and seventy-five dollars a month?

A. Yes, sir.

Mr. McFARLAND.—That is all.

(Witness excused.)

Mr. SEABURY.—Now, your Honor, I am prepared to recall Mr. Chambers and Mr. Doran for the purpose of showing that Mr. Clark did do everything that could be done to stop that engine within the shortest possible time.

Mr. KIBBEY.—They both testified to it.

The COURT.—I think it is not rebuttal.

Mr. SEABURY.—Very well, your Honor. Your Honor will permit me to except.

The COURT.—Certainly.

Mr. SEABURY.—We now rest.

Thereupon the Court takes a recess for fifteen minutes, the jurors being admonished by the Court as heretofore, and at the conclusion of the recess the jurors return into court and are called by the clerk, all answering to their names, and thereupon comes the argument of counsel to the jury which proceeds until the hour of adjournment, when the Court again admonishes the jury not to talk about the case, and thereupon takes a recess until nine o'clock A. M. November 16th, 1912.

[492] Saturday, November 16th, 1912.

At nine o'clock A. M. this day, the plaintiff being present in person and represented by counsel, and the defendant being present by its counsel, the jurors come into court and are called by the clerk, all answering to their names, and thereupon comes the further argument of the case to the jury by counsel until its conclusion, when the Court instructs the jury as to the law, the instructions being taken down by the reporter and transcribed in a separate transcript, and two bailiffs having been sworn to take charge of the jury, they retire from the courtroom in charge of their sworn bailiffs to consider of their verdict, and thereupon the following further proceedings are had herein, to wit:

The COURT.—Do either of you except to the statement of issues as made by the Court?

Mr. SEABURY.—I respectfully except to the numbered requests submitted by the defendant and charged by the Court. The rules expressly provided that we may except to such matters generally. I now respectfully except to the modification made by the Court of the plaintiff's requests number three A in so far as the charge as modified states in substance that if the jury believe that plaintiff was guilty of wilful negligence or gross negligence that then they must find for the defendant upon the ground that there is no issue of wilful or gross negligence on the part of the plaintiff in this case, and that the evidence adduced in the case is not susceptible of the inference that the plaintiff was guilty of

gross or wilful negligence, and in that connection we respectfully request your Honor to instruct the jury that there is no such question in this case as wilful neglect or want of care on the part of the plaintiff.

Thereupon the request is argued at length by plaintiff's counsel [493] to the Court, at the conclusion of which the Court says:

The COURT.—I am not apprised as yet of any necessity of recalling the jury to modify the instructions. Now, what have you to say, Judge McFarland?

Mr. McFARLAND.—We except to that part of the charge of the Court in reference to the liability of the defendant by reason of the fact that the state or the then territory at the date of the alleged accident, for the reason that the complaint alleges and all of the proof is based upon the fact that the injury occurred while the defendant company as a common carrier was engaged in interstate commerce and that it is a variance and no allegations authorize the introduction of any such evidence.

The COURT.—Do you think it necessary to state the grounds of your exception?

Mr. BENNETT.—Unless the rules or statute require it, I don't think so.

The COURT.—The rules do not require it.

Mr. McFARLAND.—We except to that part of the Court's charge in reference to the assumption of risk. The rule laid down by the Court, we think, is proper, but the modifications of it practically eliminate the principle set forth in the rule; and to

that part of the charge in reference to gross negligence and slight negligence; and that part of the charge in reference to comparative negligence; and to that part of the charge wherein the Court said to the jury that the plaintiff might assume that the law would presume that the defendant had discharged its duty—one assumption is interposed and not the corresponding one—the part of the defendant.

The COURT.—That will be paragraph ten of the Court's instructions.

Mr. McFARLAND.—We also desire to except to the giving of [494] each one of the instructions requested by the plaintiff and given by the Court, and we desire to except to the refusal of the Court to give each one of the instructions requested by the defendant and refused by the Court. We desire to except to each of these severally. I think beyond that we are not required to go.

The COURT.—I think that ought to be sufficient.

Be it further remembered that at the trial of said cause, and before the jury retired to consider of their verdict, that the Court granted permission to the defendant to embody into its bill of exceptions, if it should tender one, its objections to the instruction of the Court to the jury more at length and in detail.

[495] The deposition of J. C. Gatti, omitting caption and certificate, is as follows:

[Deposition of J. C. Gatti.]

Direct Examination.

(By L. KEARNEY.)

My name is J. C. Gatti; age, 41, and I reside at Clifton, Arizona, and am employed as a butcher.

Q. How long have you resided in Clifton?

A. About 16 years.

Q. Do you know the plaintiff in this action?

A. I do; yes, sir.

Q. Did you know the plaintiff on or about March 15, 1911?

A. Did I know him at that time? Yes, sir.

Q. Did you see him on that day?

A. Well, now, I don't know. I have forgotten the day of the accident.

Q. Are you acquainted with that piece of railway track of the defendant, extending from the depot in Clifton, down to the railroad bridge that crosses the San Francisco River, in the town of Clifton, in Greenlee County, Arizona?

A. Yes, sir, I know where those tracks lay.

Q. On the day mentioned, March 15, 1911, did you at *that witness* an accident in which the plaintiff was injured by collision of cars? A. Yes, sir.

Q. What place was that?

[496] A. That was right at the switch; one branch goes up to the Shannon Hill and the other comes down Hill's Addition right to the forks of the tracks.

Q. I wish you would go ahead now, Mr Gatti, and tell what you saw there.

(Deposition of J. C. Gatti.)

A. Well, I was in the shop at the time and I heard the whistle blow. It called my attention for the reason that it was unusual. I then came out of the butcher-shop and stood out there and looked and I saw that there was a car on the upper track, that is, on the Shannon Track, that was moving. This train was on the Hill's Addition track, that is, on the main track, was going ahead, and all of a sudden they met there, that car came down and butted against the engine and some boards went right through. I then went right away to see what was the matter. I went between the two tracks, that is, between the Shannon Hill track and the main track, couldn't see anything on the other side and as I got there I found Mr. Clark on the ground laying down. Mr. Kelley was there looking at him and another fellow or two, I forget who they were. I went up there and tried to pick him up, but he said, "Let me alone for a while until I get my breath." Mr. Kelly and myself picked him up, and we came down the line. Mr. Kelly was out of wind and could not help me any more. So I helped him down (Mr. Clark) as far as his yard steps, where there is an embankment or wall before you get to the house, and also two steps going up and two [497] down. When we got there Mr. Clark requested me to let him alone, that, he could make it by himself for reasons he said that his wife might get frightened. And that is all that I know.

Q. Did you see the freight-cars when they first started to roll?

(Deposition of J. C. Gatti.)

A. I don't know as I saw them when they first started to roll, but when I came out they were rolling, but what called my attention was the whistle. I think there was one or two and I heard the clash. I saw how the two were moving and I was expecting it.

Q. How close were they to the switch engine when you first saw them?

A. It was pretty close, because I saw them moving, and it was not very long after I saw them come together.

Q. Did you notice Mr. Clark's position before the freight struck the engine?

A. I did not. When I saw him he was on the floor and couldn't move.

Q. Had he received the injury when you saw him?

A. Yes, sir, he was on the floor and couldn't get up.

Cross-examination.

(By McFARLAND and HAMPTON.)

Q. What time of the day was this, Mr. Gatti?

A. As near as I can remember it was in the morning; it has been quite a while ago.

[498] Q. Was it in the daytime?

A. Yes, sir, it must have been between, well, it wasn't 10 o'clock. As a rule, in the morning I am around the shop.

Q. How far is the meat-shop from the place where the cars and the engine came in contact with each other?

A. It must be 100 yards; not over that.

(Deposition of J. C. Gatti.)

Q. On which side of the track would that be?
West? A. Coming toward them it was north.

Q. Where would your place of business be?

A. South.

Q. You say your attention was first called to the train by the whistle? A. The unusual whistle.

Q. Where was that whistle?

A. Right there between there and where they met.

Q. Was it the whistle of the engine?

A. Yes, sir.

Q. The engine on which Mr. Clark was?

A. Yes, sir, I am sure it was there.

Q. You heard that while you were in the shop?

A. Yes, sir.

Q. How long was it after you got out before the collision?

A. Wasn't very long; hardly two or three minutes, I know.

[499] Q. The collision while you were in your place? A. No, I believe I was on the way.

Q. And the cars on the main line were moving slowly north?

A. No, on the Shannon line, those were the cars that were moving.

Q. After you got out now, and after you heard this whistle, the cars were moving slowly up the Shannon switch?

A. Down, not up; they were pretty close to the junction then and that is what called my attention.

Q. The moving north on Shannon switch?

A. Yes, sir.

Q. Remember how many there were?

(Deposition of J. C. Gatti.)

A. No, sir, they were standing.

Q. Now, what were the cars on the main line doing when you first noticed them?

A. They were attached to Mr. Clark's engine; there were some cars attached to his engine on the main line going north.

Q. Then the cars that caused the collision with Mr. Clark's engine were coming down Shannon switch? A. Certainly.

Q. And you say they were the cars that came in contact with Mr. Clark's engine?

[500] A. Yes, sir.

Q. So the engine was attached to the cars on the main line? A. Yes, sir.

Q. No cars attached on the Shannon switch?

A. No, they were standing still.

Q. Were there any other cars on the main line except those to which Mr. Clark's engine was attached? A. I didn't notice any.

Q. You say Mr. Kelley was present when you first got to Mr. Clark?

A. Yes, sir, when I got to Mr. Clark Mr. Kelly was there and he was looking over Mr. Clark and I said, "Let's pick him up," and he said, "Let him alone."

Q. Was he on the ground? A. Yes, sir.

Q. Lying down? A. No, sir.

Q. Leaning over?

A. Was leaning over looking white as a sheet.

Q. Did he say where he was hurt?

A. No, didn't know at the time where he was hurt

(Deposition of J. C. Gatti.)

but thought it was his hip.

Q. And you and Mr. Kelly assisted him to his house?

A. Yes, sir, for a little while and Mr. Kelly said he was tired and out of breath so I took him home.

[501] Q. Did he walk any way by himself?

A. With my assistance. We went as far as the wall and when we got to the wall he said to let him alone and he would go by himself.

Q. Did he? A. Yes, sir.

Q. Did you notice any bruises or marks on his face?

A. No, sir, all I noticed was that he did not walk very well and as we got there I noticed he walked into the house by himself.

Q. Did you see Mr. Clark after that?

A. No, did not see him for a long time after that, about two or three months.

Q. What was he doing then?

A. He went away and did not see him until he came back from California.

Q. Seem to walk around then? A. Yes, sir.

Q. Walk around ever since?

A. Yes, sir, walking now.

Q. How far is Mr Clark's house from the place where the accident occurred?

A. About 175, well, about 180 yards.

Q. It would be on the opposite side of the track from your place of business? Opposite the main line between [502] the Shannon switch and the main line? A. Yes, sir.

(Deposition of J. C. Gatti.)

Redirect Examination.

(By Mr. KEARNEY.)

Q. Did Mr. Kelly come there after the collision?

A. Mr. Kelly was there when I got there.

Q. Was he there afterwards?

A. Mr. Kelly got out of wind after we packed Mr. Clark, he must have gone 10 or 15 yards.

Q. Was Mr. Kelly there before the collision?

A. He must have been there, I positively know he was there when I got there.

Q. Do you know whether he was there before?

A. No, sir, when I got there he was there.

Q. When the collision occurred were you positive the cars were going up the Shannon line or coming down? A. Well, they were coming down.

Q. Was it a fact the engine was pushing those cars and going up Shannon and freight-cars going down and running north on the main line? Didn't see anything like that?

A. As I said before that these cars were moving. I didn't see any engine but Mr. Clark's engine and Mr. Clark was going up with his engine.

Q. The collision occurred by the cars being pushed [503] up the Shannon spur. They were going up to the Shannon Company on the Shannon spur. Do you know whether or not you saw the cars being pushed up the Shannon spur by the engine and the cars that were moving down the main line and that the collision occurred by the meeting of those cars coming north of the track and the engine going up the Shannon spur? I want to know whether you

(Deposition of J. C. Gatti.)

saw this or not?

Objected to by counsel for defendant as not being a question but a narrative of events.

A. I didn't see any engine pushing those cars that was. When I came out those cars were standing there and there was only one engine in sight at the time. The collision occurred right at the point of where the two tracks meet. The cars from the Shannon Hill collided with the engine and I saw two or three planks run right through his cabin. I can't say anything else only what I saw.

Q. When you first came out of your place of business could you see Mr. Clark's engine?

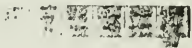
A. Not very well.

Q. Could you see it at all?

A. I could see the smoke but could not see the engine. When I ran I ran between the two tracks and that is where I saw him and Mr. Kelly was looking at him.

Q. Did Mr. Clark's position on that engine coming around that curve going south enable him to see the cars on the main line?

A. I don't know, of course I could not say to that [504] but I know that an engineer's place is on the right and when I picked him up he was on the left. His fireman, Jack, was trying to pull the boards out of there.



[Deposition of Rebeckah Manes.]

The deposition of REBECKAH MANES, omitting caption and certificate, is as follows:

Direct Examination.

(By L. KEARNEY.)

My name is Rebeckah Manes; age, 32, and I reside at Metcalf, Ariz., and am employed as a housekeeper for my husband.

Q. What was your vocation on March 15th, 1911?

A. Called as a nurse to Mr. Clark.

Q. And you nursed Mr. Clark following his injuries on the railroad, of March 15, 1911?

A. Yes, Judge.

Q. What doctor treated him?

A. Dr. Dietrich.

Q. When were you called to nurse Mr. Clark?

A. Sixteenth of March, 1911.

Q. What experience have you had as a nurse?

A. Experience in medical, surgical nurse, hospital and outside practice.

[505] Q. Are you a graduate of any institution?

A. Sister's Hospital, Los Angeles, California.

Q. When you were called did you make an examination of Mr. Clark? A. What do you mean?

Q. In reference to the injuries he received?

A. Yes, sir; when I arrived in the morning Dr. Dietrich was there and he was examining Mr. Clark and of course, I looked on.

Q. He was examining Mr. Clark? A. Yes, sir.

Q. State, then, what was the condition of Mr. Clark.

(Deposition of Rebeckah Manes.)

A. At that time he didn't state all his injuries.

Q. Did you yourself make an examination of his injuries?

A. Yes, sir, I noticed there was some new injury that was not noticed the first day I was there.

Q. What was that?

A. Injury of the lung.

Q. What did the injury consist of?

A. To my knowledge it was a fracture.

Q. Of what? A. Of the ribs.

Q. What other injury?

A. Other injuries were (interrupted).

[506] Q. Any injury about the face or head?

A. The left eye was sore and injuries of the rib in the lumbar regions.

Q. And an injury to the left eye?

A. I don't know as it was an injury but his eye was sore.

Q. Old or fresh sore?

A. Fresh one to my knowledge.

Q. Did Dr. Dietrich at that time treat the eye?

A. Gave me instructions what to do.

Q. What did he tell you to do?

A. Bathe it frequently with boracic acid solution.

Q. How long did you give that treatment?

A. During the time I was there, a week.

Q. Did you make a discovery of any other physical injury?

A. No, not any more than the pneumonia that developed.

Q. When was that?

(Deposition of Rebeckah Manes.)

A. I am not positive what day it developed.

Q. In reference to the upper broken rib that you speak about, did Dr. Dietrich tell you about it first or did you tell him?

A. I drew Dr. Dietrich's attention first, to a discoloration on the skin over the lung.

[507] Q. How long afterwards was that? How long after the doctor had been treating, did you call his attention to that condition?

A. I presume the second or third day.

Q. And you kept a record of the temperature and every day's symptoms? A. Yes, sir.

Q. What do you call the record?

A. Clinical Chart or record sheet.

Q. For whose benefit did you keep that chart?

A. Doctors'.

Q. Each day you were there attending Mr. Clark, Dr. Dietrich called for that chart? A. Yes, sir.

Q. Did you show it to him?

A. Usually had it on the dresser and he picked it up and looked at it.

Q. Did Dr. Dietrich give you any instructions in reference to the care of Mr. Clark or say anything about his condition?

A. Said had to watch Mr. Clark very closely for his condition was very serious, pneumonia developing with other injuries would prove fatal possibly.

Q. Can you state further anything that occurred?

A. Why, there were several instructions he gave, that is in regard to the seriousness of his condition.

Q. Basing your opinion upon your experience as a

(Deposition of Rebeckah Manes.)

[508] nurse and from your observation and examination of the physical condition of Mr. Clark, would you say that his injuries of which he was suffering and of which you were attending and treating as a nurse, were slight or of a serious nature?

Objected to by counsel for defendant on the grounds that witness has not qualified as an expert and second, as not a question of opinion.

A. Serious.

Q. Why do you say that they were serious? What is your reason?

Objected to by counsel for defendant on same grounds.

A. Owing to the several injuries Mr. Clark received and afterwards developing into pneumonia.

Q. At the time you were nurse what was his diet?

A. Liquid and soft diet.

Q. Why were they given?

A. Because his condition was so that solid food would be injurious to him.

Q. You took his temperature? A. Yes, sir.

Q. Was the temperature of Mr. Clark taken by Dr. Dietrich?

A. Yes, sir, while I was not there during his first visit.

Q. You was not there?

A. I was there the morning of the 16th.

[509] Q. Dr. Dietrich took the temperature of Mr. Clark at that time? A. I presume he did.

Q. Do you know whether any request was made for specimens for examination?

(Deposition of Rebeckah Manes.)

A. I don't remember.

Q. What is your recollection?

A. No no specimens were called for but it seems to me they saved some specimens for Dr. Dietrich.

Q. Did he get them?

A. Yes, sir, I think so. Mrs. Clark was ill at the time.

Q. Did you room awhile in the house of the plaintiff in this action?

A. Roomed and boarded eight months with Mr. and Mrs. Clark.

Q. Covering what period of time?

A. From November until the following April.

Q. What year was that? A. 1900, I believe.

Q. Was that a year before this accident or more?

A. Two years.

Q. State when you were there if Mr. Clark read a good deal.

A. Yes, he read a great deal when I was there.

Q. Plaintiff read a good deal at night?

[510] A. Did most of his reading at night, to my knowledge.

Q. Use glasses? A. Yes, Judge.

Q. This is your clinical report? (Produces report.) Did you make this from actual observation?

A. Yes, sir.

Cross-examination.

(By McFARLAND and HAMPTON.)

Q. Did you not see Mr. Clark until the second day after the accident? A. No, Judge.

Q. Where was he when you first saw him?

(Deposition of Rebeckah Manes.)

A. At his home, in bed.

Q. In Clifton? A. Yes, sir.

Q. What time of day did you go down?

[511] A. Down from Metcalf on the morning train, a little after nine, I should think.

Q. About nine o'clock? A. Yes, Judge.

Q. Was Dr. Dietrich there when you went in?

A. Yes, sir.

Q. He had seen him previous??

A. Yes, Judge.

Q. Did he complain of his wounds the first day you were there? A. Yes, Judge.

Q. Of what particular wounds did he complain?

A. Of the injured hip and up here (indicating the chest).

Q. Injury developed by pneumonia in the apex?

A. Yes, sir.

Q. Did you notice that the first day you saw him?

A. Did not notice this over the lung.

Q. Did you know whether Dr. Dietrich had noticed this before? A. He didn't; no.

Q. Mr. Clark was perfectly rational?

A. Yes, Judge.

Q. You would consider one with wounds he had from this accident with indications of pneumonia pretty serious case with anybody, wouldn't you?

A. Most always.

[512] Q. Would it be more serious with him than anybody else?

A. If they had injuries it would be.

Q. A serious condition? A. Yes, sir.

(Deposition of Rebeckah Manes.)

Q. There was a little inflammation in one eye?

A. Yes, sir.

Q. On the ball of the eye?

A. It seemed to be in the iris, the white part.

Q. It was inflamed in general?

A. Never made a thorough examination to find out.

Q. Just a little inflammation in his eye?

A. Yes, Judge.

Q. Find some pus? A. Yes, sir.

Q. Did the doctor say to wipe that out?

A. Said to bathe it.

Q. And you did? A. Yes, sir.

Q. How long were you attending upon him as a nurse? A. One week.

Q. You mean by that seven or eight days?

A. Seven days.

Q. Went on the second day after the accident and stayed seven days? A. Yes, sir.

[513] Q. Then you were with him eight days after the accident including the first day of the accident? A. Yes, sir, it would be eight days.

Q. Did Mr. Clark complain particularly any pain in his eye?

A. No, not in particular about the pain.

Q. He had a bad cold, hadn't he?

A. Don't know whether you would call, he had a cough a great deal.

Q. Had you in your experience seen persons have a serious inflammation of the eye?

A. Not a cold like that.

(Deposition of Rebeckah Manes.)

Q. What particular kind of a cold would have that effect on the eye? A. I don't know.

Q. You have seen people's eyes inflamed with a bad cold? A. Yes, there are lots of reasons.

Q. Dirt might have caused the eye to be in that condition? A. It might.

Q. Did Mr. Clark during the time you were there complain of any loss of vision in that eye?

A. Not to me.

Q. Did he read any during your time as a nurse?

A. Yes, sir.

[514] Q. Read every night?

A. No, Judge; last couple of days I was there.

Q. Lying in bed reading?

A. Propped up in bed.

Q. Made no complaints at all of loss of vision in his eye to you? A. No, Judge.

Q. Did Dr. Dietrich attend him every day while you were there? A. With the exception of one.

Q. Dr. Smith there?

A. Dr. Smith attended during Dr. Dietrich's absence.

Q. One day? A. Yes, sir.

Q. How long did he read at a time during the later part of your attendance as a nurse?

A. Probably 25 or 30 minutes.

Q. Read at different intervals during the day?

A. Not that I remember. About once a day.

Q. Use his glasses? A. Yes, sir.

Q. What was his condition when you left him?

A. He was very much improved.

(Deposition of Rebeckah Manes.)

Q. Was he up?

A. Sat up on a chair one day for thirty minutes.

Q. As a matter of fact, he didn't have pneumonia?

A. Didn't have, he did have pneumonia.

[515] Q. A complete case of pneumonia?

A. Yes, sir.

Q. Both lungs?

A. I don't know as both lungs were involved. I have forgotten, but I think there were.

Q. Entire lung or only a portion?

A. Entire, entire lungs were involved.

Q. Doctor treated him for that? A. Yes, sir.

Q. For his wounds? A. Yes, sir.

Q. And he was able to sit up the eighth day after he was in this accident, you say, about thirty minutes? A. Yes, sir.

Q. See him after that? A. Did I see him?

Q. I mean recently afterwards.

A. Yes, sir; I saw him in the course of a few weeks.

Q. Was he out then?

A. Had been up and down at intervals.

Q. Had been out of the house, do you know?

A. I don't know.

Q. Saw him in his house, did you? A. Yes, sir.

Q. How long were you there when you first saw him afterwards?

A. I don't remember what date I saw him. I know it [516] wasn't very long after I left there.

Q. He was up and around? A. I don't know.

Q. He appears to be up now, you see him standing

(Deposition of Rebeckah Manes.)

up there by you, don't you? A. Yes, sir.

Q. Mrs. Clark was sick at the time, wasn't she?

A. Yes, sir.

Q. Did you attend her as a nurse also?

A. I did.

Q. What was the condition of this eye when you left Mr. Clark as a nurse?

A. When I left him he was a little improved.

Q. Still some inflammation?

A. Yes, sir; I remember telling Mrs. Clark to continue the bathing after I left.

Q. You say the white part of the eye was a little bloodshot?

A. Well, I don't remember if it was bloodshot. At the time I did not pay very strict attention as the other injuries were so strictly severe.

Redirect Examination.

Q. Was it the injuries he received in this wreck or collision that brought about the condition of pneumonia? A. Yes, sir.

[517] Q. He was internally conservatively injured by the accident? A. Yes, sir.

Q. This injury induced inflammation and brought about pneumonia? A. Yes, sir.

Q. What was the condition of Mr. Clark's right eye during the time you were nurse to him?

A. I presume it was all right.

Q. The right eye during the time you were nursing him appeared to be normal?

A. It appeared that way to me.

Q. You didn't observe that the right eye was

(Deposition of Rebeckah Manes.)
inflamed nor in any way injured?

A. Not that I remember. I may have bathed both eyes when I was bathing the eye that was injured.

Q. Towards that last of your nursing did you observe anything wrong with the right eye?

A. No, Judge.

Q. What would cause pneumonia?

A. If there is a pressure over the lung.

Q. Is that the usual reason, the pressure over the lung? A. I don't know.

Q. Did you ever treat a case of pneumonia?

A. Yes, sir.

Q. Well, now, his left was normal, wasn't it, except [518] this inflammation?

A. Well, as I stated before, I did not examine his eye, until the trouble came up and the doctor told me to bathe his eye.

Q. All you noticed about that eye was some inflammation? A. Yes, sir.

Q. On the front of the eye?

A. I have forgotten whether it was or what part. Only the eye was sore.

Q. And a little pus in it and you treated that eye under the direction of Dr. Dietrich? A. Yes, sir.

Q. No complaint from Mr. Clark, except that eye was sore? A. Yes, sir.

[Deposition of Ross Thomas.]

The deposition of ROSS THOMAS, omitting caption and certificate, is as follows:

Direct Examination.

(By L. KEARNEY.)

My name is Ross Thomas; age, 33, and I reside at Clifton, Arizona, and am employed as a locomotive engineer.

Q. You know the plaintiff, T. B. Clark?

A. Yes, sir.

[519] Q. How long have you known him?

A. Something like ten years.

Q. Where did you know him?

A. Clifton, Arizona.

Q. What has been his business during that time?

A. Locomotive engineer.

Q. In whose services has he been?

A. A. & N. M. Railway Company.

Q. Is that the defendant in this case the A. & N. M. Railway Company?

A. The defendant in this action is the A. & N. M. Railway Company.

Q. Is that the company to which you refer?

A. Yes, sir.

Q. Are you in the employ of the defendants company? A. Yes, sir.

Q. How long have you been in the employ of the defendant?

A. Nine or ten years, I couldn't say positively.

Q. Has your employment been continuous?

A. Yes, sir.

(Deposition of Ross Thomas.)

Q. During that time you have been employed as locomotive engineer?

A. No, sir; I was employed as fireman, also as hostler.

[520] Q. Is that all the service of the defendant?

A. Yes, sir.

Q. Are you acquainted with that piece of track of the defendant running from the depot in Clifton, Arizona, down to the railway bridge of defendants that crosses the San Francisco river in the town of Clifton? A. Yes, sir.

Q. Do you know where the Shannon switch is?

A. Yes, sir.

Q. State what this switch is.

A. Well, it is a switch leading to the Shannon Smelter.

Q. What is the length of this switch?

A. Where, from the Shannon to—

Q. Shannon switch to Shannon Copper Company's Smelter.

A. Well, I couldn't say. It is less than a mile.

Q. From the Shannon switch to the railroad bridge that crosses the San Francisco River in the town of Clifton, you say you know that track. About what length is that piece of road?

A. From Shannon switch to bridge? Well, I could not say. We suppose fifteen car lengths as we would call them.

Q. You know the piece of road of the defendant? I mean the railroad between the Shannon switch and the wagon road that crossed the railroad about 400

(Deposition of Ross Thomas.)

feet below [521] there. A. Yes, sir.

Q. How long have you known that piece of road?

A. Ever since I have worked there.

Q. Eight or nine years?

A. Well, I should say seven years, because I haven't worked there. The first work I did was on the Coronado Road.

Q. That road we just mentioned, lying between the wagon road that crosses the railroad and the Shannon switch, is that on an inclining grade?

A. Yes, sir.

Q. What direction is the grade inclined?

A. Well, the grade is inclined towards the wagon road and it crosses there at the railroad.

Q. Inclined towards north or south?

A. Inclines to the north. I don't know the direction, don't know north, south, east or west. It seems like north to me, but is a northerly direction.

Q. The incline is lower from that road to the switch? It is lower than it is further down?

A. It is lower from the Shannon store to end of bridge this way than at the bridge. It is lower this way towards the Shannon switch.

Q. You know whether cars being placed on that part of the track would remain without the brakes having been set?

[522] A. Sometimes they would and sometimes they would not. Just depends if the cars were stopped dead still, they would stand there and sometimes they wouldn't stand. It depends on the jar of the wind and circumstances. We are always very

(Deposition of Ross Thomas.)

particular to see that the cars were always stopped perfectly still.

Q. Have you noticed cars roll on that part of the track without having been blocked would roll away?

A. Yes, sir.

Q. How many times?

A. Twice that I know that they rolled any distance. A number of times I have seen them start off, but I know of several times they would run quite a distance after we got up over the switch. A great many times I noticed they would roll down after we got off, but we would stop them again.

Q. You know of quite a number of times the cars on the track having been left on that part, part of the time between the bridge and Shannon switch, cars would roll. Would they roll towards the direction of Clifton or the bridge?

A. Toward Clifton.

Q. You know of that quite often, do you?

A. Not every day, but we were always very careful that they were stopped perfectly still and sometimes they would roll and sometimes they wouldn't; never made a practice of rolling every time we stopped them.

[523] Q. Did you say that as often as once a month you knew they would roll?

A. No, I couldn't say that they would roll as often as once a month, because we never paid any particular attention, only we knew that they would roll very easily. We always took caution that we stopped them perfectly still.

(Deposition of Ross Thomas.)

Q. How frequently would you say?

A. In the summer time they would roll easier than in winter. Maybe twice every two months they would move on us, but we never paid any attention to it.

Q. You say during the time, this seven or eight years, you know of twice each month, if freight-cars left standing on that part of the track they would run north?

A. I have not worked on that engine, remember, all the time in this number of years—I have worked here. I have only worked on the engine, I couldn't say how long, but the longest length of time was one straight year, but having been off and on there all the time since. I guess I have run the engine more than any one man besides Mr. Clark. After that I worked in the yard here, but haven't run the engine any seven or eight years, that is that particular engine.

Q. Well, on that particular piece of track from base of Shannon switch to the railway bridge, about how often have you been over that every day during the past seven or eight years?

[524] A. How often? How many times, you mean? Well, no, because I have not been over it every day. Some days have been over it every day, and sometimes I was working on the Coronado Railway and was not out of here at all.

Q. Would you say, then, once a week?

A. Well, I wouldn't say. There are lots of weeks I wasn't over the tracks at all as I was confined to

(Deposition of Ross Thomas.)

the other road. But when I was working on the A. & N. M. I was on the switch engine and was over it a number of times a day. But on another engine was over it possibly twice a day.

Q. When you were running over that part of the road was Mr. Kline with you?

A. He was when he was on the switch engine.

Q. When was that? What year?

A. Couldn't say the year, but it must have been in 1909 or 1908.

Q. Mr. Kline was with you then?

A. Yes, sir, he was in the yards, then. But I worked with Mr. Kline when he was conductor here, several years ago. I ran over that part of the road.

Q. Was Mr. Kline with you at the time when the cars of that piece of track from the Shannon switch to the railway bridge—(interrupted.)

Objected to and I want to object to all this testimony as to the cars rolling or the number of times they rolled at any other time than at the date of the accident. [525] Because of being irrelevant and immaterial. No allegation in the complaint as to the cars rolling at any other time other than at the date of the accident.

Q. Do you know whether or not Mr. J. M. Kline, brakeman, employee of the defendant, knew that the cars set out on the track of the defendant, between Shannon switch and the railroad bridge crossing the San Francisco River, in the town of Clifton, would remain on that part of the track without the brakes having been set or the same blocked?

(Deposition of Ross Thomas.)

Objected to on the ground as irrelevant and immaterial. Does not tend to support any issue raised by the opinion in this case.

A. I don't know whether he does or not. I couldn't say. He certainly did, I guess.

Q. Was he present at any time when the cars would run on that track?

Objected to as irrelevant and immaterial.

A. Yes, I guess he was. He has worked with us all the time; he surely must have been.

Q. Times you speak about, the cars left on the track without the brakes having been set would run, at any of these times was Mr. Kline with you as a servant of the defendant?

Objected to by counsel for the defendant for the same reason.

A. Yes, sir.

[526] Q. Then Mr. Kline was with you some of those times you speak about, the cars having run on that piece of track without the brakes having been set? A. Yes, sir, was with us.

Objected to by the counsel for the defendant as irrelevant and immaterial.

A. Was with the engine all the time, except when he is yardmaster, he is always with the engine.

Q. So you will say that Mr. Kline was present when cars left on the track without the brakes having been set did run? A. Yes, sir.

Objected to by counsel for the defendant for the same reason.

Q. Can you state about what time this was?

(Deposition of Ross Thomas.)

A. Well, I could not state definitely the exact time. I have a record at home. I can tell you every day I have worked. But I could not tell you now the exact day, date or month I have worked on that engine; my memory isn't that good.

Q. Could you tell the year?

A. It's about 1909, I judge.

Q. Was that part of the track during the year 1909, 1910 and 1911, in practically the same condition? A. Yes, sir.

[527] Q. Remember, that piece that I am asking about was the same, was that piece lying between the Shannon switch and the railway bridge we mentioned, was it during the years 1909, 1910, 1911, in about the same condition all the while during that period? A. Yes, sir.

Q. Covering the years 1910 and 1912 was John Kelly in the service of the defendant?

A. Yes sir.

Q. What position did he hold?

A. Yardmaster.

Q. During those years, I mean from 1909 to 1912, was he yardmaster? A. Yes, sir.

Q. State whether or not yardmaster Kelly knew that cars placed or left on this piece of track between the Shannon switch and the railroad bridge without the same having been blocked or brakes set thereon, would remain on that part of the track.

Objected to by the counsel for the defendant on the same ground as irrelevant and immaterial, and it calls *financier* from the witness of his knowledge of a

(Deposition of Ross Thomas.)

matter that is personal to the party inquired about.

A. Well, I couldn't say.

Q. Did you ever talk to Mr. Kelly about cars running away on that part of the track?

[528] Objected to by the counsel for the defendant for the reason that Mr. Kelly is not a party to this action.

A. No, sir.

Q. Mr. Kelly ever speak to you about cars running on that part of the track without the brakes having been set?

Objected to by the counsel for the defendant as irrelevant and immaterial.

A. Mr. Kelly says very little to the engine men.

Q. Was Mr. Kelly present at any time when the cars did run on that part of the track?

A. I could not say.

Q. Do you know whether he was present at any time when cars would run on that part of the track?

A. I do not know.

Q. Was he an employee of the defendant along with you as part of the crew of that switch engine?

A. He is an employee, but he is not always with the engine, very seldom.

Q. Does he have anything to do with the cutting off of cars or the moving of the cars, making up the trains, giving orders to be set out on any part of the track?

Objected to by counsel for the defendant. Unless the witness can testify from your personal knowledge what the duties of Mr. Kelly as yardmaster are.

(Deposition of Ross Thomas.)

A. He is the man that under whose orders the engine works.

[529] Q. Then it is he who gives out orders and makes up the trains? A. Yes, sir.

Q. Then when cars are set out on the tracks and on this particular piece of track, from the Shannon switch to the railway bridge, we have talked about, it was the duty of Mr. Kelly to direct the movement of those cars.

A. These men are under his instructions.

Q. Then he does give the direction for the movement of such cars? A. Yes, sir.

Q. When cars are set out and removed, he is usually present, is he not? A. Not all the time; no.

Q. Half of the time?

A. No, sir, I could not say that he was.

Q. Is he present one-tenth of the time?

A. Yes, I should say so.

Q. Could you say more?

A. Well, sometimes he is present possibly three or four hours; sometimes he is only around the engine an hour.

Q. How long has Mr. Kelly been in the employ of the defendant? A. I don't know.

Q. Do you know whether he has been employed at all—one day or one month? [530] A. Yes, sir.

Q. About how much time?

A. Well, he has been employed about 8 or 9 years, to my knowledge, in this yard.

Q. You mean the yard of the defendant, at Clinton, Arizona? A. Yes, sir.

(Deposition of Ross Thomas.)

I move that all of the answers of the witness in reference to the switch, the number of times cars have run and the several occasions be stricken out, for the reason that the same is irrelevant and immaterial, and for the reason that there is no allegations in the complaint under which such testimony would be competent or irrelevant.

Cross-examination.

(By Mr. McFARLAND.)

Q. How long do you say you have known Mr. Clark? A. For the past ten or eleven years.

Q. Did you know him previous to his coming to Clifton? A. No, sir.

Q. Have you ever worked with him?

A. Yes, sir.

Q. In what capacity? A. Locomotive fireman.

Q. How long a period did that cover?

A. Well, I haven't worked for Clark for several years, [531] but it was not regular.

Q. You were both in the service of the A. & N. M. R. R.? A. Yes, sir.

Q. What were you doing during the time you associated with him?

A. I was locomotive fireman.

Q. What was he doing?

A. Running the engine?

Q. Were you and he fireman and engineer on the same engine? A. Yes.

Q. How long a time did this association cover?

A. Well, more or less for a year.

Q. How was the engine engaged during this time?

(Deposition of Ross Thomas.)

A. Freight service and also a little passenger service.

Q. Did you ever work with him on the switch engine? A. No, sir.

Q. State as near as you can the year you associated with him as fireman.

A. About 1904 or 1905.

Q. During that period did he usually observe the signals given him? A. Yes, sir, very closely.

Q. Never failed to obey signals during that period? [532] No, sir.

Q. Did you ever hear any complaint during the period covered by your association with him that he failed to obey signals? A. No.

Q. Did you covering that period hear any complaint of the brakeman? A. No, sir.

Q. That he ever failed to observe or obey signals?

A. Not while I worked with him.

Q. Did you hear any complaint of the brakemen either or subsequent time that he failed to observe or obey signals? A. No, sir.

Q. Isn't it a fact that it was a constant complaint of the brakemen on the trains of which he was the engineer that he universally either failed to observe or obey signals?

A. Not while I worked with him.

Q. Nor at any time before or since?

A. O, I've heard complaint, but not while I worked with him; there was no complaint whatever while I worked with him.

Q. But you say you have heard before and after?

(Deposition of Ross Thomas.)

A. No, sir, not before; I have heard switchmen complain but paid no attention to it as they complain about every man so far as that is concerned.

Q. How many switchmen have you heard complain since [533] your association with him as fireman.

A. I couldn't say; that is something we never pay any attention to.

Q. But you have since that time frequently heard complaint that he had disobeyed or disregarded signals? A. No.

Q. Then why do you say that you heard these complaints and paid no attention to them?

A. Because it's something that happens most every day in the yards.

Q. You say there is a downgrade between the north end of the bridge and the point where the Shannon switch intersects with the main line of the road? A. Yes.

Q. Do you know what that grade is?

A. If you mean what the per cent grade is, I do not.

Q. Suppose it's one-eighth or one-fourth per cent, would be a freight-car standing still move of its own volition at any point between the north end of the bridge and the point where the Shannon switch intersects with the main line?

A. That depends on circumstances; if it were in the heat of the day when the oil in the boxes was hot, it might roll; if it was winter time and the boxes were frozen up, I guess it wouldn't roll.

(Deposition of Ross Thomas.)

Q. Now, suppose that the cars loaded with freight had only been moved on the day of the accident not more [534] than a mile, what would you say then about a car that had been stopped moving on the grade between the switch and the frog where the Shannon switch intersects with the main line?

A. Well, if it was stopped perfectly still, the wind not blowing, and no jar, it possibly might stand, if only the one car.

Q. What difference if it was only one car or more?

A. The heavier the load on the grade the heavier it is to hold.

Q. Would it make any difference on a straight or a curve? A. Yes, sir.

Q. What would be the difference?

A. Well, it depends on the degree of the curve, the sharper the curve, the harder the car binds, on a straight track the car rolls free.

Q. Then you would say that a car loaded would be more liable to start on a straight track than it would on a curve? A. Yes, sir.

Q. Do you mean by that, without any reference to the degree of the curve?

A. Well, I mean that a car will roll on a straight track easier than on a curve; the sharper the curve the harder it is to get around, bind more on a curve than on a straight track.

[535] Q. Were you ever connected with a crew that was engaged in switching cars at that point?

A. Yes, sir.

Q. What was the method you used in switching cars from the main line up the Shannon switch?

(Deposition of Ross Thomas.)

A. You mean the cars that were to go up the Shannon hill, do you not? Well, they were stopped on the main line below the Shannon switch and cut off from three to six at a time, we taking up as many as we could at a time, sometimes we had twenty, sometimes ten and sometimes seven or eight.

Q. What was the method you used in respect to the cars that remained on the main line after you had cut off a part and switched them up the Shannon hill?

A. Well, they were just simply stopped on the main line, and as long as they were stopped perfectly still, we let them stand there till they were all up, and if they wouldn't stand, we used sticks or rocks.

Q. You have had a lot of experience in railroad-ing? A. About ten years.

Q. In different capacities? A. Yes, sir.

Q. You consider that a careful way to handle a train of loaded cars on that grade between the Shannon switch and the bridge?

[536] A. I don't consider that it's the safest way but it's the way that it's been practiced here more or less.

Q. Did you consider that a reasonably safe way to switch?

A. Well, yes, we didn't consider that we were in any great danger.

Q. Was that the method adopted by the train crew while Mr. Clark had charge of the engine?

A. I couldn't say. I wasn't on the engine while

(Deposition of Ross Thomas.)

he was in the yards.

Q. So far as you know, tho, that has been the method adopted up to this time for switching cars between the Shannon switch and the bridge?

A. That is, up till the time they put in the block system.

Q. You say Mr. Kelly is the yardmaster and has been for six or seven years past? A. Yes, sir.

Q. And you say that he directs the movement of the cars in the yard? A. No, sir.

Q. He doesn't direct you as to the detail or, in other words, how you shall move the cars, or the manner in which the switching is to be done?

A. No, sir; he has an engineer foreman who takes orders from him, and he is the man that the crew works under. Foreman simply directs the movement of the cars [537] but as to the details or the particular manner in which this is to be done is left to the judgment of the crew by the foreman.

Q. Then Mr. Kelly has nothing to do with the details of the work or the switching of the engine, but that is a matter exclusively in the hands of the engine foreman?

A. He isn't personally with the engine all the time, but he is the man who is with the cars all the time; he directs the crew and he is the man who is responsible for the crew, is my opinion.

Q. Do you allude to the fireman as the engine foreman? A. No, sir, he is the switchman.

Q. Then I understand you to say that Mr. Kelly has nothing to do with the details of the switching,

(Deposition of Ross Thomas.)

does not direct how it shall be done, simply orders or directs in a general way that certain cars be switched or placed at certain points, and the manner of doing it, in fact all the details are directed and controlled by the engine foreman? A. Yes, sir.

Q. Is Mr. Clark familiar with the details of the work in switching in the yards?

A. So far as I know he is.

Q. Is he familiar with the details as used as you have testified in taking cars from the main line up the Shannon hill?

[538] A. As far as I know.

Q. Were those methods used that you have testified to while Mr. Clark had charge of the switch engine in switching cars up the Shannon hill?

A. I couldn't say. I wasn't with him while in the yards.

Q. Then you were never around or about him while he was engineer on the switch engine?

A. I never worked with him in the yards.

Q. Then during your entire acquaintance with Mr. Clark you never saw him nor were with him or about him while he had charge of the switch engine in the yards?

A. Only as to get on, maybe to ride up to the round-house, or happened to get on when the engine was going the same direction I was, or something like that.

Q. Now, that is the extent of your acquaintance and association with him during the whole time he had charge of the switch engine? A. Yes.

(Deposition of Ross Thomas.)

Q. Never saw him switch cars?

A. O, I saw him switch cars as he passed along the road. I saw him many times a day, as I was working on the road.

Q. What would he be doing those times?

A. He was usually looking in the direction he was going, handling the engine. I couldn't say just exactly what he was doing, but that is what a man has to do when [539] he is on an engine.

Q. Then you did see him operating the engine in the yards?

A. O, yes; I've seen him operating in the yards.

Q. Did you ever see him switch cars?

A. Yes, sir.

Q. Did you see Mr. Clark at any time while he was suffering from injuries received in this accident?

A. No, sir; I have never seen Clark only as I've seen him on the street after he was able to be around.

Q. Had any recent conversation with him?

A. That depends.

Q. On the subject of this accident? A. No, sir.

Q. Then you have never had any conversation with him on that subject? A. No, sir.

Q. Did you know that you were going to be a witness in this case?

A. No, sir; he came and gave me a letter while I was eating lunch in the roundhouse.

Q. Have you ever talked with anybody about this accident?

A. O, talked with the railroad men here.

(Deposition of Ross Thomas.)

Q. But never had any conversation with him on the subject?

A. I asked how it happened just as friends would, [540] but never went into any details. I didn't consider it any of my business, so I didn't ask him; he simply told me how he was getting along as a friend.

Q. Did he describe his injuries to you?

A. Yes, sir.

Q. Say he was getting along all right?

A. O, able to get around but felt the effects of it.

Redirect Examination.

(By Mr. KEARNEY.)

Q. Did you say that you worked with Mr. Clark about two years?

A. Off and on for about two years; not two years straight.

Q. Were you firing for Mr. Clark? A. Yes, sir.

Q. When freight-cars are set out on the track do the rules of the company require the brakes to be set on them?

A. Yes, according to the rules; that is, any place of danger.

Q. Don't they require on all grades brakes to be set?

A. Well, that is the sum and substance of it.

Q. To avoid any accident by cars running, ought that not to be done?

A. Yes, sir; that is the safest.

Cross-examination.

Q. Do not the rules provide that no engine shall

(Deposition of Ross Thomas.)

be detached from a train until the train is brought to a stand-still?

[541] A. Yes; but it doesn't include yard service.

Q. Is that fact or opinion? A. Fact.

Q. You have a copy of the rules and are familiar with them? A. Yes, sir.

Q. And don't the rules further provide that no engine or with any number of cars detached from the train shall be moved unless the train has been brought to a standstill and the brake set on the cars remaining?

A. If it's on a grade; on any level track it will remain standing.

Q. Do the rules say anything about grades or danger? A. Yes, sir.

Q. Don't the rules say in all cases that before an engine is detached from a train either with or without cars composing a part of a train that the train shall come to a standstill, and the brakes set on the cars remaining?

A. Yes; if it is a place of danger.

Q. If these rules had been observed in this particular instance by the trainmen, would this accident have happened? A. No, sir.

Q. All those employees had a book of rules?

A. Haven't had a book of rules for years.

Q. You don't feel very kindly to the management of the road, do you?

A. I have no hard feelings toward them at all; they [542] have always treated me very nicely.

(Deposition of Ross Thomas.)

Q. You had no difficulty in getting a book of rules, did you?

A. No, sir; they gave it to me when I asked for it.

Q. This is the first accident that has happened to an employee of the company as the result of switching cars from the main line up the Shannon Hill covering the period that you have been employed in the company? A. Yes, sir.

Q. And the method of switching has been the same, so far as you know during this time?

A. Yes, sir.

[Deposition of W. H. Parker.]

The deposition of W. H. PARKER, omitting caption and certificate, is as follows:

Direct Examination.

(By L. KEARNEY.)

Q. What is your name? A. W. H. Parker.

Q. What is your age? A. 37.

Q. Place of residence?

[543] A. Clifton, Arizona.

Q. Occupation? A. Section foreman.

Q. Mr. Parker, how many years have you been railroading? A. 14 years.

Q. What capacity? A. Track department.

Q. What position do you hold now?

A. Section foreman in the yards.

Q. That is for the defendant? A. Yes.

Q. Mr. Parker, are you acquainted with that piece of track on the defendant's railroad lying between the Shannon switch and the railroad bridge which

(Deposition of W. H. Parker.)

crosses the San Francisco River, in the town of Clifton, Greenlee County, Arizona? A. Yes, sir.

Q. How long have you been acquainted with that piece of track? A. Something over two years.

Q. During that time, have you had charge of that part of the defendant's railroad? A. Yes, sir.

Q. Covering that period has the grade and condition of the track been the same?

A. It has up to—I don't remember when it was; it was eight or ten months ago I raised the track through there.

[544] Q. What portion of the track did you raise?

Objected to by the counsel for the defendant, because of condition of the track since the accident.

The attorney for the plaintiff states the object of the testimony is for the purpose of arriving at the grade and determining what it was before the accident.

Counsel for the defendant objects to the evidence offered by the plaintiff because the proposed evidence would not show or tend to show the grade of that part of the track at the date, or before the accident.

A. I began, I suppose, about two hundred feet this side of the Shannon switch and ran my raise out to the crossing.

Q. As I understand, you began the point of the raise of your track about two hundred feet north of the Shannon switch, and from that point south to the wagon road, crossing near the Shannon store?

(Deposition of W. H. Parker.)

A. Yes, sir; somewhere about there. I don't know exactly; about two hundred feet, I suppose.

Q. Tell us fully what height you raised that part of the track.

A. Well, I supposed I raised it all the way from six to twelve inches. I don't know exactly.

Q. What point was the least and what the greatest raise?

A. The least I don't know, and the greatest was twelve inches.

Q. At what point was the greatest raise?

[545] A. It was towards the road crossing from the switch.

Q. The point where you made the greatest raise was near the switch? A. Yes, sir.

Q. Did the raise taper from the Shannon switch on towards the crossing?

A. The frog was in a sag from three to four rail lengths even from the Shannon crossing.

Q. Did you take measurements of the grade of that portion of the track which was raised?

A. No, sir; I never measured it, but I had the track man take a notch board, and I couldn't say just how high I put it but it was somewhere around twelve inches.

Q. Do you know how far it is from the Shannon switch to the road crossing?

A. No, sir; I never measured it.

Q. Did you find that portion of the track to be of an inclined grade?

A. Yes, sir; it is downgrade from the Shannon

(Deposition of W. H. Parker.)

road crossing to the Shannon switch.

Q. How much lower was the Shannon switch than the road crossing?

A. It was between ten and twelve inches or more. I raised this switch even with the Shannon road crossing and got it level.

Q. Do I *understand* to say that you have had eight or ten years' experience with railroads?

A. Yes, soon to be fourteen years.

[546] Q. I'll ask you your opinion. Was the grade on that portion of the road which you state that you raised, of so much incline that cars set out thereon would not remain without the brakes having been set or the same securely blocked to keep from running?

Objected to by counsel for the defendant, for reason that the witness has not qualified as expert on these lines.

A. Yes, I consider it was.

Q. Then you would say from your experience with railroad tracks for the period of fourteen years that you would regard it as unsafe to leave cars on the portion of the track that you raised without the brakes having been set to the same?

Yes, sir, I would consider it unsafe.

Cross-examination.

(By Mr. McFARLAND.)

Q. How long have you been in employ with the Arizona & New Mexico R. R.?

A. Since November, 1909.

Q. In what capacity? A. Section foreman.

(Deposition of W. H. Parker.)

Q. What other roads have you worked for?

A. Illinois Central.

Q. Where and when?

A. Oakland, Mississippi.

Q. What capacity,

A. First laborer, then section foreman, 1898.

[547] Q. Where did you next work?

A. Water Valley, Miss. Same system, Ill. Central.

Q. Covering what time?

A. From, I believe, March or April, 1899, till the following December in the same year.

Q. That section foreman? A. Yes, sir.

Q. Where next?

A. Yazoo, Miss. Valley, on Sunflower District, headquarters Tutweiler, same capacity.

Q. Just go ahead with the different places and what you did.

A. I remained on that gang until 1902, then at Bellzonia, Miss. I stayed there until Nov. of the same year, and went to braking out of Memphis, Tenn., on the same road. Stayed there till September, 1903, then went to Benoit, Miss., as section foreman of the Vicksburg division, same road, and remained there till 1905, in February. Went from there to Mansfield, Louisiana; worked for the Kansas City Southern, as section foreman, till October 20, 1909. Then came here.

Q. Have you ever had any experience in construction of railroad beds? A. Yes, sir.

(Deposition of W. H. Parker.)

Q. How much experience have you had in that line?

A. Not so very much. I have laid a great deal of steel on new grades and leveled them up.

Q. Do you know the grade of that roadbed from the crossing [548] in front of the Shannon store down to where the Shannon switch, after you completed your work on this line?

A. I raised the frog of that switch to the same height as the Shannon crossing.

Q. Do you mean down at the switch?

A. Yes, sir, the whole switch something like two hundred feet north of the switch, and pulled up to the switch then from there to the crossing.

Q. Then the roadbed from two hundred feet north of the Shannon switch to the point where the wagon road crosses the roadbed in front of the Shannon store was absolutely level when you completed the work you say you did on the roadbed after this accident?

A. I raised it with a jack to that crossing and put this new dirt under it, but the first train that passed over, was liable to settle it.

Q. What is the difference between the grade now and immediately after you completed your work, after the accident?

A. I don't know, sir, really, but I suppose it had settled some. I never did give it a second raise.

Q. You do not know what the grade is now, do you?

A. No, sir, I do not.

Q. You do not know what the grade was before the

(Deposition of W. H. Parker.)

accident? A. No, sir.

Q. All you know is that you raised the grade at some points along the line, but there was no uniform grade?

[549] A. I couldn't say whether uniform or not, but I know that the Shannon frog had what is called a sag in it.

Q. How much was that sag?

A. Highest place something like ten or twelve inches.

Q. Did the grade incline north from the Shannon switch and south from the crossing?

A. Yes, sir, I think it did, because I started north of the switch with my raise.

Q. Then the lowest place would be about halfway between these points?

A. No, sir; I wouldn't say whether it was or not, because I don't remember. The reason I know that the frog was raised ten or twelve inches, I had to pull three or four rails on the Shannon hill switch, then left a dip on that switch.

Q. What do you understand by a one per cent grade?

A. A one per cent grade is one foot per hundred feet.

Q. Now, was there any place beginning two hundred feet this side of the Shannon switch extending to where the road crossed the roadbed in front of the Shannon store, where there was as much as one per cent grade before you repaired the roadbed?

A. Not paying much attention to the track at the

(Deposition of W. H. Parker.)

time I couldn't say exactly.

Q. Was there any place between these points where there was one-half of one per cent?

A. Yes, it was that or more.

Q. That is you were positive of it?

[550] A. Yes, sir.

Q. What is the steepest grade between points two hundred feet this side of the Shannon switch and the wagon crossing? A. I don't know.

Q. The only way you had to measure grades was with your eye, wasn't it?

A. Well, I didn't really measure that; the only way I would tell was by where the track came up.

Q. Now, I understand you to say that you were positive that there were places beginning at a point two hundred feet north of the Shannon switch extending down to the wagon road crossing over the roadbed in front of the Shannon store, was one-half of one per cent, or more before you raised the roadbed? A. Yes, sir.

Q. Now, how do you know this?

A. From the distance of the height I pulled the track with a jack.

Q. Will a loaded car, or one or more loaded cars, move of their own volition on a grade of one-half of one per cent, if the brakes are not set, nor the wheels chocked?

A. It's owing to how the engineer handles them, and when they cut the engine loose, lots of times it's liable to move the car. A car can stand on a joint if the center is high, just so the wheels are on a turn;

(Deposition of W. H. Parker.)

it's liable to move on a grade.

[551] Q. Were there any such joints on this piece of track on the 15 day of April, 1911?

A. I don't remember whether there was or not.

Q. Well, now, if cars were standing perfectly still, loaded, will they move of their own volition on a grade of half of one per cent?

A. It's owing to circumstances, a train could be a passing and start them, or you could be standing on top of the car and start it by shaking it.

Q. Now, will it start without some one of these conditions?

A. I believe it would; it's on a hill, and anything that rolls will roll down a hill.

Q. Did you ever see a car roll on a half of one per cent grade?

A. No, I never saw one roll on one.

Q. Then you, as an expert, give your opinion.

A. Don't class me as an expert.

Q. Do you think that a car would stand of its own motion on a grade of one-fourth of one per cent?

A. Chances are it would.

Q. What about one-eighth of one per cent?

A. You are getting down too fine for me.

Q. Did you ever see any cars get away on a grade?

A. Yes, sir, in this yard.

Q. What was the grade?

A. I don't know what the grade was.

[552] Q. Where was that?

A. Don't remember, but believe in the Coronado yards.

(Deposition of W. H. Parker.)

Q. Did you ever see a car get away in the yards of the defendant here in Clifton? A. No, sir.

Q. The grade in the yards up north of the Shannon switch are as steep as they are below, are they not?

A. Yes, sir.

Q. And the grade here is as steep as the grade you have been speaking about?

A. I couldn't say, unless you put a level on it.

Q. And you don't know what the grade was at the time of the accident? A. No, sir, I don't.

Q. Don't know whether it was one-eighth of one per cent or two per cent?

A. It was more than an eighth, a half per cent, anyway.

Q. What would you say to a civil engineer if he would tell you that he had put an instrument on the grade from the Shannon switch to the crossing, and there wasn't a place between those points where the grade was one-fourth of one per cent?

A. I wouldn't believe him.

Q. In other words, you would take your own opinion in reference to a grade to that of a competent engineer?

A. Yes, sir; I have seen them put down three stakes, and they wouldn't line.

[553] Q. Who had obtained the grade by the use of instruments?

A. No, sir; I am not that far up, but on that particular track I wouldn't believe him; but would after I had raised the track.

(Deposition of W. H. Parker.)

Redirect Examination.

(By M. KEARNEY.)

From the Shannon switch to the wagon crossing in front of the Shannon store, being a stretch of defendant's railroad, about five or six hundred feet, is that road straight?

A. From the Shannon switch to the Shannon crossing, is straight as near as I can remember.

Q. When did you raise that part of the defendant's road?

A. I don't remember; it was at the time we were putting in that block signal. I have forgotten exactly what day it was—eight or ten months from present time.

Recross-examination.

(By Mr. McFARLAND.)

Q. Will a loaded car or three or four loaded cars start more readily from gravity on a straight track than they will on a curved track?

A. Certainly they will.

Q. Do you say that from experience or just as an opinion? A. I say that from opinion.

[Deposition of G. L. Coffee.]

[554] The deposition of G. L. COFFEE, omitting caption and certificate, is as follows:

Direct Examination.

(By L. KEARNEY.)

Q. What is your name? A. G. L. Coffee.

Q. Age? A. 31.

Q. Place of residence? A. Clifton, Arizona.

(Deposition of G. L. Coffee.)

Q. Occupation? A. City Marshal.

Q. Do you know the plaintiff, Thomas P. Clark?

A. Yes.

Q. Are you acquainted with that piece of railroad bed of the defendant between the Shannon switch and the railroad bridge in the town of Clifton, Arizona?

A. In some ways.

Q. You recognize the location of that piece of track? A. Yes.

Q. Did you see the plaintiff on March 15, 1911?

A. Yes.

Q. Did you witness the accident of plaintiff on defendant's road March 15, 1911? A. Yes.

[555] Q. Just tell what you saw and know about that, making a detailed statement.

A. Well, I was coming uptown that morning, I was coming up the road, and they were fixing to make the Shannon hill with some cars, and there were some cars sitting on the spur, and they had pulled down and had come back, making the Shannon hill run, when the accident then occurred. Clark was engineer, Jack Chambers was on the engine firing, I think St. Thomas was there, and Kline; and when the accident occurred Kelly came out, I think, from his house. Gatti came up there and I ran around the engine, and Clark was off his engine on the ground. I asked him if he was hurt, and about that time Kelly came up. Kelly asked him if he was hurt; he said he was. Gatti and another party, whom I don't remember positively, but I think Kelly helped Clark

(Deposition of G. L. Coffee.)

up, and assisted him in getting to the hospital or his home.

Q. How long before the cars collided with the engine of which Clark was running; did you see those cars?

A. I should judge about two minutes.

Q. What place did you see them?

A. On the spur.

Q. Did you observe four cars that collided with the engine before the collision took place?

A. In a way.

Q. What was that way?

A. Well, I took no particular notice of the cars.

[556] Q. Did they roll any distance after you saw them before they collided with the engine?

A. I can't say.

Q. Did you witness the collision? A. Yes.

Q. What part of the engine did these cars strike?

A. I think they struck the cab.

Q. Was the position of Mr. Clark such that he could see those four freight-cars before they collided with his engine? A. I should say he could not.

Q. Why do you say he could not see them?

A. The condition of the track would prevent him from seeing them.

Q. At that time, did that part of the track slope toward the north? A. I don't know.

Q. John T. Kelly wasn't there until after the collision?

A. He was away, to the best of my knowledge.

Q. Do you know where he was?

(Deposition of G. L. Coffee.)

A. I think he was at his house.

Q. About the time of the collision, Kelly came from the direction of his home?

A. The best I can remember he did.

Q. Was J. M. Kline there all the while?

A. He was there when I saw the accident.

[557] Q. At the time of the collision, where was J. M. Kline?

A. I can't say, but he was present on the ground, when I ran around the engine.

Q. Did you observe Kline on any box-cars just before the accident?

A. There was someone on the cars that was on the engine, but I don't remember which of the two it was.

Q. Those were the cars which were then being pushed up on the Shannon spur? A. Yes.

Cross-question.

(By Mr. McFARLAND.)

Q. At what point and at what distance were you at the time the collision occurred on the engine of Mr. Clark?

A. I was directly opposite the engine in the street, possibly forty feet distant from the engine.

Q. From what direction had you come to this point? A. South.

Q. That would be from the direction of the bridge, would it? A. Yes.

Q. Did you see the cars on the main line?

A. I saw the cars.

Q. Where were they when you first saw them?

A. Below the switch.

(Deposition of G. L. Coffee.)

[558] Q. What direction would that be from the switch? A. South.

Q. How far were they from the switch?

A. That I can't say.

Q. When did you first see Mr. Clark's engine?

A. When they started to make the run for the Shannon hill.

Q. That would be going approximately south.

A. Yes.

Q. What was the speed of his engine, fast or slow?

A. I should judge possibly making fifteen miles an hour.

Q. Did you hear any signal?

A. Can't recall if I did.

Q. Were there any signs given by anyone?

A. Not that I know of.

Q. From your position you could see Clark's engine, and also the cars on the main line before the accident? A. Yes, sir.

Q. And you say that you don't think it possible for Clark to have seen the cars on the main line before the accident? A. I don't think he could.

Q. Did you see Mr. Clark after the accident?

A. Yes.

Q. Did he say he was injured? A. Yes, sir.

[559] Q. What did he say?

A. He said his back was hurt.

Q. Did you notice his face? A. Yes, sir.

Q. And his head? A. Yes, sir.

Q. Did you see any evidence of bruises or violence on his head or face? A. I did not.

(Deposition of G. L. Coffee.)

Q. Did he make any complaint about any injury to his face or head? A. Not that I heard.

Q. Did you notice his eyes?

A. Not particularly.

Q. Did you notice any evidence of bruises or violence to his eyes or either of them? A. No, sir.

Q. What is your position? A. City marshal.

Q. And was it at that time? A. Yes, sir.

Q. Do you know about how long after the accident that Mr. Clark got out of his home?

A. No, I do not.

Q. Well, approximately, how long have you seen him out since the accident?

A. I haven't the slightest idea.

[560] Q. Six months? A. I should say so; yes.

Q. What was he doing when you saw him out?

A. Knocking around town.

Q. Seem to get around pretty well? A. Yes.

Q. Did you notice any difference of his getting around and about before than since the accident?

A. Not particularly so.

Q. Seems to get around like anyone else, doesn't he? A. Yes.

Q. If you hadn't known that he was injured would the way he walks and moves around indicate to you that he had ever been injured?

A. I don't think so.

Q. Then you see no difference now in the way he walks around and gets about town, to the way he walked and moved around before the accident?

(Deposition of G. L. Coffee.)

A. No, sir.

Q. Have you seen him almost daily since he got out of his house after the accident? A. No, sir.

Q. Well, approximately how often have you seen him in the last six months?

A. Possibly a dozen times.

[561] Redirect Examination.

(By L. KEARNEY.)

Q. At the time Mr. Clark was injured, did you make a special examination of his left eye, whether it or that part of his head next to that eye had received a bruise? A. I made no examination at all.

Q. Then, for all you know, he may have received a serious bruise about his left eye?

A. It's possible, for the reason that he was carried away immediately; everyone was very much excited at the time.

Recross-examination.

(By Mr. McFARLAND.)

Q. You say you saw his face; if he had had a serious bruise at or near his left eye, would you likely have seen it?

A. It's an equal chance that I would or I wouldn't.

Q. If he had had an arm severed from his body, would you have likely have seen that or noticed that?

A. I ran around the front of the engine, and he was with his face towards the car, and I came around on the left side, his left side. By the time I got there or immediately afterwards, Kelly and Gatti ran up and picked him right up and carried him right off.

[Deposition of E. T. Morton.]

[562] The deposition of E. T. MORTON, omitting caption and certificate is as follows:

Direct Examination.

(By L. KEARNEY.)

Q. What is your name? A. E. T. Morton.

Q. Age? A. 26.

Q. Place of residence? A. Clifton, Arizona.

Q. Occupation?

A. Civil and mining engineer.

Q. What experience have you had in civil and mining engineering?

A. I have had four years' practical experience.

Q. Are you a deputy of the United States, and mineral surveyor? A. I am.

Q. Are you acquainted with the section of the railroad track of the defendant lying between the Shannon switch and the defendants' railroad bridge which crosses the San Francisco River, in the town of Clifton, Greenlee County, Arizona; and also that part of the defendant's road adjoining said Shannon switch and extending north thereon for the distance of two hundred feet?

A. I am acquainted with the road from the point of [563] switch to the point of curve in front of the Shannon store.

Q. Is the switch you refer to the one I mentioned—the switch Shannon? A. It is.

Q. Have you recently made a survey of that part of defendant's road for the purpose of returning the grade thereof? A. I have.

Q. What are the measurements—have you a pro-

(Deposition of E. T. Morton.)

file map of that part of the road? A. I have.

Q. Is it a correct map of that part of the road in its present condition? A. Yes.

Q. Was this map made under your supervision?

A. It was.

Q. Do you here ascertain that it is correct?

A. I do.

Q. Map is marked Plaintiff Exhibit No. 2 and filed for evidence.

Cross-examination.

(By Mr. McFARLAND.)

Q. You say this is a correct map of that part of defendant's roadbed and is made from actual measurements on the ground? A. It is.

[564] Q. Did you make it yourself?

A. I took all the measurements myself; made the calculations and checked the drawing after it was made.

Q. But you did not make the drawing on the map as offered in evidence?

A. No, but it was made under my supervision.

Q. By whom? A. H. C. Macovain.

Objected to by the counsel for the defendant, on the ground that the best evidence of the map offered is by the party who actually made the map.

Redirect Examination.

Q. You have actually checked the map in reference to your measurements on the ground? A. I have.

Q. Is it a correct representation of your measurement? A. Yes.

Q. Locate the switch on this drawing.

(Deposition of E. T. Morton.)

A. Point of switch is designated on the upper left-hand corner of Plaintiff's Exhibit No. 2.

Q. Point of Shannon switch, then, from there, on what part of your map have you marked wagon road crossing?

A. No point is marked wagon road crossing, but the wagon road crossing is a few feet in front of the point of curve in front of the Shannon store.

[565] Q. From the point that you have designated as crossing to the Shannon switch is a distance of how many feet?

A. There isn't any point of distance made as crossing, but the point of curve as designated is five hundred and twenty-five feet from the Shannon switch.

Q. This track of road shown by your map, what is the grade of it now between Shannon switch and the curve?

A. Beginning at the point of the switch at the Shannon Hill and proceeding towards the point of curve in front of the Shannon store, the first hundred and fifty feet is an average grade of thirteen hundredths per cent down, the next seventy-five feet had an average grade of zero, the next three hundred feet has an average upgrade of sixteen hundredths per cent.

Q. If the point of switch should be one foot lower than it is at the present time extending back gradually to the point of curve covering that distance of five hundred and twenty-five feet, then that would be the grade of that part of the road?

A. The grade would be one-fourth of one per cent

(Deposition of E. T. Morton.)

down for the point of curve to the point of switch.

Q. What direction nearly does that road run in reference to the cardinal points of the compass?

A. Nearly north and south.

Q. Does the writing on exhibit No. 2, marked point of switch to Shannon hill, designate a north part of that road with reference to the point of curve in front of [566] Shannon store? A. It does.

Q. Between the points just designated, is that road straight or curved? A. It is straight.

Recross-examination.

(By Mr. McFARLAND.)

Q. How did you ascertain the grade of the roadbed between the several points set forth on the map?

A. By measuring the total distances, beginning at the point of switch and taking points every twenty-five feet, on both rails to the point of curve and finding the difference of elevation of these points, then taking the average of the elevation on the rails and dividing the difference of elevation of the points designated by the horizontal distance between said points.

Q. What did you find to be the average grade from the point of curve as shown on the map and the Shannon switch?

A. I didn't calculate the average grade between those two points.

Q. Then your map only shows the grade of the roadbed between the different points designated on the map between the point of curve and the Shannon switch?

(Deposition of E. T. Morton.)

A. It shows the downgrade and the level portion of the track and the part of the grade that is ascending; [567] it shows the track exactly as it is.

Q. Does your map show the average grade descending and the average grade ascending between the point marked on your map as point of curve in front of the Shannon store and the point designated on the map, point of switch at the Shannon hill?

A. You have got to make that question fuller for it to mean anything.

Q. When did you make this map?

A. The eighth and ninth of April, 1912.

Q. Do you know what the grade of that roadbed is between the points designated on the map and was on April 15, 1911? A. I do not.

Q. Do you know what the grade was at any time between March 15, 1911, and the date that you made your survey. A. I do not.

Q. For whom, if anyone, did you make this survey and map? A. I was employed by Mr. Kearney.

Q. Do you mean L. Kearney, counsel at law, of Clifton? A. I do.

Q. Is it the same Kearney who is the attorney for the plaintiff in this case?

A. I am not acquainted with the plaintiff.

[568] Q. Is it the same Kearney who is attorney for the plaintiff in the cause now pending?

A. It is.

Redirect Examination.

(By L. KEARNEY.)

Q. Morton, you have designated on your map, Plaintiff Exhibit No. 2, the letters to Shannon hill,

(Deposition of E. T. Morton.)

which designates apparently a road leading off from another road. I wish you would tell me what this is.

A. That is the beginning of a switch leading from the main line of the Arizona & New Mexico R. R. to Shannon hill.

Q. Does that switch run to the Shannon Copper Co. smelter? A. Yes.

Q. Approximately about what distance?

A. A little over half a mile.

Q. Did you ascertain the grade from the switch designated on the map to the Shannon hill, or any distance from the point of switch?

Objected to by counsel for the defendant, because map doesn't show any survey of that line of road; it's irrelevant and immaterial, what the grade is.

A. I did.

Q. What is the elevation point of the Shannon switch leading on up over the Shannon spur to the Shannon smelter covering the distance that you took the measurements?

[569] A. I don't remember the exact elevations, but remember the percentage of grade.

Q. What is the grade per cent?

A. Commencing at the point of switch and proceeding towards the Shannon hill the first one hundred and ten feet has an upgrade of two and four-tenths per cent; the next one hundred feet had an upgrade of three and thirty-six hundredths per cent; the next hundred feet has an upgrade of three and sixty-three hundredths per cent; that is as far as I determined the grade.

(Deposition of E. T. Morton.)

Q. Those measurements you just mentioned being upgrade, are made on the Shannon switch which leads off to the Shannon Smelter?

A. They were.

Recross-examination.

(By Mr. McFARLAND.)

Q. Are those measurements and elevations shown on your map? A. They are not.

Q. Why didn't you make your map show these elevations?

A. I determined them after the map was made.

Q. Then your first instructions from Mr. Kearney were to obtain the distances and elevations on the main line of the defendant company?

A. I understood them to be such, but on conversing [570] with Mr. Kearney he stated that he had asked for the grade on the first part of the switch.

Q. Do you know the average grade for the first four hundred feet beginning at the Shannon switch?

A. I haven't calculated the average grade for the first four hundred feet, but determined the grade for the first hundred and ten feet; then the next three hundred at intervals of one hundred feet.

[Deposition of Thomas J. St. Thomas.]

[571] The deposition of THOMAS J. ST. THOMAS, omitting caption and certificate, is as follows:

Direct Examination.

(By H. A. HARDINGE.)

Mr. HARDINGE.—I suppose it may be stipu-

(Deposition of Thomas J. St. Thomas.)

lated that the testimony may be taken down in short-hand and then reread to the witness or read by him afterwards, the same as if taken in long-hand?

Mr. McFARLAND.—That is satisfactory.

Q. State your name, age, occupation and place of residence?

A. Thomas J. St. Thomas; age, 26; switchman; residence, Pajaro, California.

Q. Are you acquainted with the plaintiff, Thomas P. Clark? A. Yes.

Q. How long have you known him and where?

A. I have known him at Clifton, Arizona, from May, 1908, until April, 1911.

Q. Where were you on March 15, 1911?

A. Clifton, Arizona.

Q. What were you doing?

A. I was employed as a switchman in the Clifton yards.

Q. For the Arizona and New Mexico Railway Company, a corporation, the defendant in this action? A. Yes.

Q. Were you working as a switchman at that time? [572] A. Yes.

Q. Who composed the crew with whom you worked?

A. J. T. Kelly, yardmaster, J. M. Kline, foreman, Jesse Murphy, brakeman, Jack Chambers, fireman, and Thomas P. Clark, engineer.

Q. This Thomas P. Clark is the same man that was injured later? A. Yes, the same man.

Q. Are you acquainted with that part of the de-

(Deposition of Thomas J. St. Thomas.)

defendant's railroad track about eight hundred feet southerly from the Shannon switch to the defendant's railroad bridge which crosses the San Francisco River in the town of Clifton, Arizona?

A. Yes.

Q. Is that the part of the road where the accident took place at that time? A. Yes.

Q. How long have you known that particular part of the track?

A. From May, 1908, until May, 1911.

Q. How familiar were you with the track, this particular part of the track?

A. I have been over it not less than twice a day at the time I was there.

Q. And you were a member of the crew that was moving cars across over this particular track on the said 15th of March, 1911? A. Yes.

Q. Was anyone injured on that day?

[573] A. Thomas P. Clark was injured.

Q. How was he injured?

A. Cutting off four cars and leaving them on the main track, and pulled the other four up with the engine over the switch and starting back up the hill to Shannon switch, and the cars rolled down and collided with the engine.

Q. These four cars that were left at the Shannon switch, how were they secured? A. No way at all.

Q. The brakes were not set?

A. No brakes were set, and the cars were not blocked.

Q. Should these cars have been blocked?

(Deposition of Thomas J. St. Thomas.)

Mr. McFARLAND.—I object to that as calling for an opinion of the witness, and the witness is not qualified as an expert. A. Yes.

Q. Why do you say these cars should have been blocked?

A. Because the cars rolled down there twice before.

Q. Where these cars were left, was it down or up grade?

A. That certain part of the track was inclined to be downgrade.

Q. If the brakes on these cars had been set or the cars been blocked, would they have rolled down the hill or ran down the hill? A. No.

Mr. McFARLAND.—I object to that upon the same grounds as the previous question.

[574] A. No.

Q. Now, how do you know that these brakes were not set nor the same blocked or chocked?

A. Because I saw J. M. Kline cut the four cars off and did not get up on top of the cars and did not set the brakes and did not block the same.

Q. Whose duty was it to set the brakes on these four cars which collided with the engine?

A. J. M. Kline.

Q. Did you see these four cars collide with the engine? A. Yes.

Q. What length of time expired, to the best of your judgment, from the time you first saw these cars approaching the engine until the collision took place?

A. A very short time; maybe ten seconds.

(Deposition of Thomas J. St. Thomas.)

Q. How far away were the cars from the engine when you first saw them? A. 15 or 20 feet.

Q. Just before the collision took place was there a stop signal given to stop the engine? A. Yes.

Q. Who gave the signal? A. J. M. Kline.

Q. Could the engineer have seen these approaching cars? A. No.

Q. Why?

A. It was on a curve and the cars obstructed his view.

Q. What cars obstructed his view?

[575] A. The ones they were shoving up the hill next to the engine.

Q. Should the stop signal have been given by Mr. Kline? A. No.

Q. Why?

A. If the stop signal had not been given the engine and cars would have cleared the main line; the engine was going about eight miles an hour, and the cars were going very slow.

Q. About what rate were the cars going?

A. Not half as fast as the engine.

Q. Not half as fast as the engine? A. No, sir.

Q. How far ought the engine to have gone to have cleared, approximately?

A. Oh, about 16 or 20 feet.

Q. And these cars were from 15 to 20 feet, or probably 25 feet from the engine when you first observed them? A. Yes.

Q. And when was the stop signal given in regard to the time you first observed the approaching cars?

(Deposition of Thomas J. St. Thomas.)

A. The stop signal was given a few seconds before.

Q. How far were the cars from the engine when the stop signal was given?

A. About a car-length and a half.

Q. How many feet would that be?

A. About 60 feet.

Q. About 60 feet. Then, as a railroad man and familiar with railroading, would you say that if the stop signal had not [576] been given, and the car was about a car-length and a half from the engine, and the cars were moving only one-half as fast as the engine, would not in all probability the engine have cleared if the stop signal had not been given?

A. Yes.

Mr. McFARLAND.—I object to that as calling for the opinion of the witness, and the witness is not qualified as an expert. A. Yes.

Q. You have been railroading a number of years, have you? A. Six or seven years.

Q. From this railroad bridge to the Shannon switch is it or is it not downgrade?

A. Inclined to be downgrade in certain places.

Q. State whether or not if cars were left on that point of the track between the said railroad bridge and the Shannon switch without the brakes having been set or the same blocked, would or would not they remained thereon?

A. At times they would remain there and other times they would roll down.

Q. Have you seen them roll down there before this? A. Yes.

(Deposition of Thomas J. St. Thomas.)

Q. Twice before? A. Yes.

Q. Had Mr. Kline and the other members of the crew also seen them roll down?

A. They were present at one time they rolled down that I know of.

[577] Q. At the time of the collision was it the duty of anyone to keep a lookout for the cars that might run down the track and cause such a collision?

A. The whole crew was supposed to look out.

Q. Did you have a full crew at the time of the accident that day?

A. Not at the time of the accident.

Q. Not at the time of the accident?

A. One switchman was left up on top of the hill.

Q. Who was the party that was left up on top of the hill? A. Jesse Murphy.

Q. Now, what would you say was the proximate cause of Mr. Clark's injuries?

Mr. McFARLAND.—I object to that as calling for the opinion of the witness.

A. Because the cars came back down on the main line and collided with the engine because the brakes were not set, and that stop signal given to the engineer.

Q. Did the railroad company enforce any rules for the management and conduct of its cars and the management of the same?

A. They had a book of rules but they never were enforced.

Q. Did you ever give signals to Mr. Clark, the engineer? A. Yes.

(Deposition of Thomas J. St. Thomas.)

Q. Did he observe those signals readily?

A. Yes.

[578] Q. Do you know whether his eyesight was good or bad? A. As far as I know it was good.

Q. Did you ever hear any complaint about him not observing the signals? A. No.

Q. Now, to what extent was Mr. Clark injured, or how was he injured?

A. When I saw him he was on the ground, complaining of his back; could not walk, and had a little scratch over his left eye, bleeding a little bit and his hip bothered him some.

Q. What was the condition of the engine where he was, his place in the engine?

A. The cab was strained out of place; the pipes broke along the side of the engine.

Mr. HARDINGE.—That is all.

Cross-examination.

(By Mr. McFARLAND.)

Q. I understand that you say that you were in the service of the defendant from 1908 until 1911?

A. Yes.

Q. During that time in what capacity did you serve? A. Braking and switching.

Q. Of course you are familiar with the yards at Clifton?

A. I worked steady in the yard for the last two years.

Q. Were in the yards. Which two years was that? A. The last two years.

Q. That would be 1910 and 1911? A. Yes.

(Deposition of Thomas J. St. Thomas.)

Q. What time did you leave the service of the defendant? A. It was in April.

[579] Q. How long after the accident?

A. Why, about a month, I think.

Q. Then did you come directly to California?

A. No, I stayed in Clifton two months, I think.

Q. Still in the service of the company?

A. No, I was in the service of the—

Q. How long after the accident did you remain in the service of the company? A. About a month.

Q. Now, you say that cars left standing on the main line between the railroad bridge and Shannon switch would move if the brakes were not set or the cars chocked?

A. They would at times and at times they would not.

Q. During the two years that you worked as brakeman in the yards how often were you engaged in switching cars from the main line up to the Shannon switch?

A. It would be once or twice every day.

Q. Once or twice every day? A. Yes.

Q. Now, during that two years the cars that were left there without the brakes being set or being chocked remained on the track?

A. Yes, except twice that I saw them roll down.

Q. Twice in the two years? A. Yes.

Q. And during the other portion of that time they did remain stationary or move without the brakes being set or being blocked?

[580] A. As far as I know.

(Deposition of Thomas J. St. Thomas.)

Q. As far as you know. So that was the usual method employed by the employees in switching the cars to the switch?

Mr. HARDINGE.—I object to that as incompetent, irrelevant and immaterial.

Q. Was Mr. Clark familiar with the method of switching cars from the main line up to the Shannon switch? A. Yes.

Q. He knew it was the custom of the employees to permit cars to remain without the brakes being set or blocked, or without the wheels being chocked on the main line that were to be taken up to the Shannon switch?

Mr. HARDINGE.—I make the same objection.

A. As far as he knew, I guess he did not know whether the brakes were set or not, or whether they were chocked.

Q. Do you know the rule of the company requiring the engineer to see that the brakes were set on all trains when stopped?

Mr. HARDINGE.—I object to that as incompetent, irrelevant and immaterial, and the rule-book of the company is the best evidence.

A. No, I do not.

Q. You don't know that? A. No.

Q. Do you know that the rules of the company require the engineer to see that the brakes are set before he disconnects his engine either with or without cars?

A. No, I don't know of it in the yard service.

[581] Mr. HARDINGE.—I object to that on the same grounds.

(Deposition of Thomas J. St. Thomas.)

Q. Do you know of it in any other service?

A. No.

Q. Did you have a copy of the rules? A. No.

Q. Did Mr. Clark have a copy of the rules, so far as you know?

A. They never furnished a copy of the rules. I never seen a book of rules as long as I have been there.

Q. You know Mr. Clark did not have a book of rules?

Mr. HARDINGE.—I object to that as incompetent, irrelevant and immaterial.

A. I don't know whether—he may have had one, but I don't know.

Q. You don't know anything about that?

A. No, sir.

Q. Do you know what the grade on the main line from Clifton is between the railroad bridge and the Shannon switch? A. About six miles an hour.

Q. The grade, I say. A. The grade?

Q. Yes.

A. Why, it is a little bit—supposed to be level, a little bit downgrade towards the switch.

Q. You mean to say it is down grade from the bridge to the Shannon switch?

A. In a certain place by the crossing it is inclined to be a little bit downgrade.

[582] Q. About how much?

A. Not a great deal; just the least bit.

Q. Are you prepared to say just what grade a car will stand without the brakes being set? A. No.

(Deposition of Thomas J. St. Thomas.)

Q. Then why do you say that a car would run on that grade if the brakes are not set?

Mr. HARDINGE.—I object to that as incompetent, irrelevant and immaterial, and argumentative.

A. Because I have seen them run there twice.

Q. Then you have seen them stop there when they did not run, haven't you? A. Yes.

Q. And you have seen them during the years 1910 and 1911? A. Yes.

Q. And only two instances where they did run?

A. Yes.

Q. And all other instances they remained where they were set without the brakes being set

A. As far as I know.

Q. Where were those cars that were moved up to that joint the day of the accident?

A. They were between the bridge across the Frisco river and the Shannon switch.

Q. Were they there—did you find them there when you went down that day?

A. No, they were left there from the yards, shoved down from the yards.

[583] Q. Up toward the tank?

A. Up towards the tank. Came in on a freight train just before that.

Q. That is on the morning of the 15th?

A. They came in in the forenoon—came in on the same train, or a train just came up and we switched them out and were taking them up the hill.

Q. You are quite positive about that?

A. I am quite positive about it; that is my recol-

(Deposition of Thomas J. St. Thomas.)

lection about the way we got the cars.

Q. And when cars that were taken down to the point between the Shannon switch and the railroad bridge were taken from the main line would the direction be towards the top? A. Yes.

Q. How many of them were there taken down that morning? A. 12.

Q. Had any cars been switched from the main line up to the Shannon switch previous to the time the accident occurred? A. No.

Q. These were the first cars?

A. Four cars were switched up before these four were taken down: 12 was taken down and that left 8 down below.

Q. Were the brakes set on those four cars that you left, the first four? A. No.

Q. Did they move? A. No.

Q. Then it was the second four cars that were being taken [584] up that collided with the engine.

A. No, it was the last four that was run down that collided with the engine.

Q. The last four? A. Yes.

Q. Then 8 had been previously switched up?

A. Four had been switched up and four more were going up, and there were four more left down there.

Q. The second four?

A. The second four, just taking them up when the other four collided with them.

Q. Do you know a man in Clifton by the name of John C. Gatti? A. Yes.

(Deposition of Thomas J. St. Thomas.)

Q. Was he there the day of the accident?

A. He helped take Mr. Clark over to the house.

Q. If you say that this collision would not have occurred, the four remaining cars on the track would not have rolled unless the brakes had been set, why was it that the cars that were there before these, including these four, did not run when the brakes were not set?

Mr. HARDINGE.—I object to that as incompetent, irrelevant and immaterial, and also a conclusion of the witness.

A. The cars that ran were set back farther; they were back, cleared further than these four were; sometimes cars were left farther from the crossing and sometimes right up to the crossing.

[585] Q. You say you never knew of any defect in Mr. Clark's eyesight?

A. Not that I ever heard of.

Q. And to your personal knowledge he always obeyed signals promptly?

A. He did for me, as far as I know.

Q. You can only speak so far as your personal knowledge is concerned? A. Yes.

Q. So far as you know personally? A. Yes.

Q. You don't know whether he obeyed signals given him by others or not?

A. As far as I knew he did.

Q. It was his uniform course to obey signals promptly?

A. That was what he was supposed to do.

Q. How long have you known Mr. Clark?

(Deposition of Thomas J. St. Thomas.)

A. Since May, 1908, until May 1911.

Q. Now, you are positive that you saw Mr. J. M. Kline cut off the four cars? A. Yes, sir.

Q. They were disconnected from the train that caused the accident? A. Yes.

Q. And you are positive that he did not set any brakes on those cars? A. Yes.

[586] Q. You know that? A. Yes.

Q. And are positive of it? A. Yes.

Q. What were you doing at the time he cut those cars?

A. I was up on the head car passing signals.

Q. On the four cars that were in the accident?

A. The four cars that were tied to the engine.

Q. Then they had been cut off from the train?

A. No, it was tied to the engine.

Q. Tied to the engine?

A. The four cars we were holding on to. I was on the car next to the engine, the four cars that were cut off.

Q. Where was Kline at the time?

A. He was four cars from the engine cutting off the four cars.

Q. You are positive that he was there?

A. I am.

Q. You were watching him at the time?

A. Yes.

Q. Would you have seen if he had set or had not set the brakes? A. Yes.

Q. Why did you not direct him to set the brakes if they were not set?

(Deposition of Thomas J. St. Thomas.)

A. It was not my place to direct; he was the foreman; he was there; he was supposed to direct us.

[587] Q. If you knew the cars would not stay there without being blocked or having the brakes set, why did you not go back and set the brakes?

Mr. HARDINGE.—I object to that as incompetent, irrelevant and immaterial, and as having been already answered.

A. Because it was not my place to do so. He was foreman; he was supposed to do so, to instruct us what to do, and he knew because—

Q. Was Kline foreman? A. Yes.

Q. Did you ever set any brakes at all without his direction when you were switching? A. No, sir.

Q. You never did anything except what he told you to do?

A. I did not, no, sir, only if he did not happen to be there.

Q. From whom did you get directions to discharge your duty if he was not there?

A. When he was not there?

Q. Yes.

A. I would have to do my duty and do the best I could.

Q. So that there were times when you set brakes and did other things without his direction?

A. Yes.

Q. You say he gave you no directions at this time?

A. No.

[588] Q. Quite positive he did not set the brakes?

A. Yes.

(Deposition of Thomas J. St. Thomas.)

Q. And you knew that the cars would roll if the brakes were not set?

A. I knew they rolled at certain times; sometimes they would roll and sometimes they would not.

Q. Was Mr. Clark where he could see Kline?

A. No, it was on a curve.

Q. At the time that the cars were disconnected from the train?

A. At least the engine was on a little curve.

Q. So that Mr. Clark in the engine could not see Mr. Kline from where he was at the time the four cars were disconnected from the train?

A. I can't say he saw him, being on a curve and hid from him.

Q. I am speaking of the time when you were speaking about disconnecting the cars.

A. That is what I am speaking about.

Q. You are positive he could not see him?

A. I don't think he could see him because I took my signal from him, to go ahead.

Q. Did you give that direction from Mr. Kline to him, give him that signal, to go ahead? A. Yes.

Q. Now, where was the engine approximately, between the railroad [589] bridge and the Shannon switch, when that signal was given to go ahead?

A. Why, about a car-length north of the Shannon switch, a little better than a car-length.

Q. You say that Mr. Clark at that position on his engine on the track could not see Kline at that time?

A. He probably could have seen him if he looked for him, but he was not looking for him. I was on

(Deposition of Thomas J. St. Thomas.)

top; he may have seen him if he looked for him. I don't believe he looked for him.

Q. He did not look to Mr. Kline for signals, but he looked to you?

A. I gave the stop signal and go ahead signal; he took it from me.

Q. Did Mr. Kline direct you when to give this stop signal and go ahead signal?

A. Whenever he gave it I passed it to the engineer.

Q. You passed it to him from Mr. Kline?

A. Yes.

Q. Positive about that? A. Yes.

Q. As positive about that as anything else you have testified to?

A. He gave me the go ahead signal and I passed it to Mr. Clark.

Q. In moving these cars from the main line, on the main line, in order to get up to the Shannon switch, how far [590] up north would you go above the Shannon switch before you began to back them up by the switch?

A. Sometimes two or three car-lengths over the switch.

Q. Two or three car-lengths? A. Yes.

Q. How far did that carry them around the curve?

A. Why, four cars, that would carry them around the point of rocks.

Q. Now, I understand you to say in your direct examination that if Mr. Clark was on his engine and at the point of rock there, that he could not see the

(Deposition of Thomas J. St. Thomas.)

four cars coming down north from the railroad bridge?

A. At the point of rock he could see those cars standing on the track and backing away, only about a second when they would be in sight, these cars on the switch would be out of sight.

Q. What would obstruct the view?

A. The cars backing up the hill.

Q. On which side of the engine in reference to cars that were rolling would he be in backing up to the Shannon switch?

A. He was on the right-hand side of the engine when he hit the switch.

Q. The same side the cars were rolling, would he not?

A. Well, when he got around the curve he would be on the same side the cars were on.

Q. But before that he would be on the other side?

[591] A. Before that his engine would be on the curve and he could see across; he could see the cars across the engine on the curve and see the cars backing up; when he started uphill he would be on the same side the cars were.

Q. He would change sides then when he—from the time he started?

A. He would not change sides at all.

Q. I understand you to say that from his position on the engine when he was backing these cars up to the Shannon switch, that at the point of rocks he could not see the cars rolling on the main line?

A. He could see the cars on the main line at the

(Deposition of Thomas J. St. Thomas.)

point of rock; he could see those cars from the tank looking across the tank; looking across the engine, looking back that way, but nobody could tell whether they were moving from that distance or not.

Q. But he could see them?

A. He could see them generally from that distance.

Q. What distance would that be north of the Shannon switch?

A. It would be about six or seven car-lengths.

Q. Then he could see the cars on the main line six car-lengths north of the Shannon switch?

A. Before he started to back up.

Q. Before he started to back up, would there be anything to obstruct his view after he began to back up until he got his engine onto the switch?

[592] A. Yes, the cars that were backing up would obstruct his view.

Q. He could not see them? A. No, sir.

Q. He could only see them when he started backing up?

A. He could see the cars when they started.

Q. Mr. Kline was on the fourth car from the engine, you say? A. Yes.

Q. How many cars had cleared the main line and were onto the switch at the time of the collision?

A. Four.

Q. Four. How much, if any, of the engine had cleared the main line and onto the switch before the collision? A. Why, the tank had cleared.

Q. Now, I understand you to say that this signal had not been given to Mr. Kline that the engine would

(Deposition of Thomas J. St. Thomas.)

have cleared and there would have been no accident?

A. Yes.

Q. Where was Mr. Kline when he gave this signal?

A. The last car.

Q. Then he would be four car-lengths from the engineer? A. Yes.

Q. No one on those cars except you and Mr. Kline?

A. That is all.

Q. Two of you? A. Yes.

[593] Q. You are quite positive he gave that signal? A. Yes.

Q. You saw him give it?

A. I saw him give it.

Q. And knew when he gave the signal it would cause a collision?

A. I did not know at the time. I knew afterwards. I did not think at the time. I was excited.

Q. Didn't you know that the engine would not clear itself on the main line if he obeyed that signal?

A. Well, he started to stop and then it was no use; we were up against it. I knew it was going to hit after it got started to stop.

Q. You say that if that signal had not been given him the engine would have cleared the main line and got onto the Shannon switch safely?

A. At the rate the cars were going about eight miles an hour, in my judgment he would have cleared.

Q. And you knew that at the time the signal was given?

A. I did not think of it at the time the signal was given. I knew of it afterwards.

(Deposition of Thomas J. St. Thomas.)

Q. And yet you did not counteract that signal or make a motion to keep going?

A. No; it was too late.

Q. Knowing that that would cause a collision if that signal was obeyed?

A. Well, I did not take time to think about it then.

[594] How long was it after the signal was given that the accident occurred?

A. A few seconds; about ten or fifteen seconds, I think.

Q. You were on the car next to Mr. Clark?

A. Yes.

Q. Which end of the car?

A. On the end next to the engine.

Q. And was your attention directed before that signal or at the time to Mr. Kline or Mr. Clark?

A. I saw Mr. Kline at the time.

Q. What position were you on that car?

A. Sitting on the end of the car.

Q. Which way was your face—north or south?

A. South, not quite south, kind of sideways.

Q. Were you sitting on the end or the side of the car?

A. The side of the car, right where the step is to climb up on the top of the car, the engineer's side.

Q. The engineer's side? A. Yes.

Q. You at that time were watching Mr. Kline?

A. I had to turn around to see him. I turned around to see him give the signal at the same time I see the cars.

Q. You never saw the cars until you got the sig-

(Deposition of Thomas J. St. Thomas.)

nal? A. No, sir.

Q. You were sitting on the side of the main line?

A. Yes.

Q. And you could not have been over ten or fifteen feet [595] from that car as it was rolling down?

A. I was 20 or 25 feet.

Q. From the car, as it was rolling down?

A. Yes.

Q. When that signal was given? A. Yes.

Q. From the front of the car rolling down?

A. Yes.

Q. You mean to say that the front of the car that was rolling was 25 feet from the engine when Mr. Kline gave that signal?

A. May have been, and may not have been; may have been 20 feet.

Q. Would you say it was as much as 20 feet?

A. Yes.

Q. Now, what rate were the cars going that were rolling down the hill?

A. They were rolling very slow; I can't just say what the rate would be.

Q. At what rate was the engine going when going up to the Shannon switch?

A. About eight miles an hour before the stop signal.

Q. Now, you say that cars going at that speed on the main line and not less would have collided in ten seconds? A. Well, I don't know; may have.

Q. You might be mistaken about that rate?

A. It may be a mistake about the rate, but I know

(Deposition of Thomas J. St. Thomas.)

[596] it was a short time, and might be mistaken about the number of feet.

Q. It may have been less than that rate, and you might be mistaken about the distance? You are just guessing about it? A. I did not take the time.

Q. Were you still sitting on that car when the collision occurred?

A. I only had time to get onto the middle of the car.

Q. The middle of it? A. Yes.

Q. That was after the signal was given?

A. Yes, just at the time the signal was given.

Q. Where did you say Kline was then?

A. On the last car.

Q. He would be four car-lengths from you?

A. Four car-lengths from the engine.

Q. Did you notice him before that?

A. I noticed him when he gave me the signal to back up; gave the signal to back up; he gave me the high-ball signal to back up.

Q. And then you were watching him, as I understand you, when he gave this signal to stop on the switch? A. On the switch?

Q. Yes.

A. Why, he gave the sign to back up.

Q. Four cars had cleared and were by the switch on the main line?

A. Three cars had gone by and cleared on the main line [597] and passed by—

Q. At the time of the collision? A. Yes.

Q. Why hadn't the cars on the main line cleared

(Deposition of Thomas J. St. Thomas.)

with the car on the switch if there was one car that had not cleared the main line?

A. Because it had not run up that far; it had not run far enough to clear it.

Q. If the first car from the engine had not cleared the main line the cars coming down the main line, would they have collided with the cars instead of the engine? A. They would if they came far enough.

Q. I understand you to say that they could not clear.

A. All the cars cleared when they went up.

Q. All of them? A. Yes.

Q. What did you mean by saying that one car had not yet cleared when the accident occurred?

A. The way you spoke I took it going up the main line.

Q. How long had Mr. Clark charge of the switch engine at that time, if you know?

Mr. HARDINGE.—I object to that as incompetent, irrelevant and immaterial.

A. A little over a year, I think.

Q. During all of this time he had charge of that switch engine and you were brakeman on that switch engine the brakes had never been set at this particular point on the main line? A. No.

[598] Q. Is it the duty of any particular brakeman to keep a look-out?

A. Supposed to be the crew's duty to keep a look-out.

Q. The whole crew? A. Yes.

(Deposition of Thomas J. St. Thomas.)

Q. Then that would be part of your duty, would it not?

A. If we were shorthanded; we were short one man on that day; left one man up on the hill; supposed to be with us.

Q. If that duty devolved upon the entire crew, why didn't you see that the brakes were set on these cars before the engine was disconnected from the remainder of the train with these cars?

Mr HARDINGE.—I object to that as incompetent, irrelevant and immaterial, and already having been answered, and argumentative.

A. If I had done that the foreman would probably call me down and say I was butting in on his work.

Q. Then you would not feel it your duty to do that to avoid an accident?

A. If I thought it was going to cause an accident and be that serious I probably would have told him to do so.

Q. Have you had any correspondence with Mr. Clark recently on this subject? A. Not at all.

Q. Ever have any communication with him on the subject of this trial since you left there? A. No.

Q. How did you know you were going to be a witness here to-day?

[599] Mr. HARDINGE.—I object to that as incompetent, irrelevant and immaterial, and not proper cross-examination.

A. Mr. Kearney wrote me a letter and told me he wanted me to be here to-day.

Q. Mr. Kearney tell you anything about what you

(Deposition of Thomas J. St. Thomas.)

would be expected to testify to? A. Nothing.

Mr. HARDINGE.—I make the same objection.

Q. Did he furnish you with a copy of the interrogatories that would be asked you here to-day?

A. No, sir.

Q. It is your opinion that the proximate cause of this accident was the failure to set the brakes on the cars which remained on the main line? A. Yes.

Q. And yet you worked there two years previous?

A. Yes.

Q. And they never rolled but twice?

A. Only twice before, not any one certain place, the lowest place of the track.

Q. Then your belief was that the real cause of the accident was the failure to set the brakes?

A. Yes.

Q. If they had been set the accident would not have happened?

A. If they had been set the accident would not have happened.

[600] Q. And you were the brakeman on that train? A. Yes.

Q. You knew that they were on the switch?

A. Yes.

Q. You knew that they were not set? You knew the cars would roll if they were not set?

A. At times they would do so.

Q. You consider that you discharged your duty by not setting those brakes?

Mr. HARDINGE.—I object to that as incompetent, irrelevant and immaterial, and not proper

(Deposition of Thomas J. St. Thomas.)

cross-examination.

A. I discharged my duty where I was on the car by passing the signal; that was the duty following the engine.

Q. You say that Mr. Clark at the time you saw him had a scratch over his left eye and had more or less blood on his face?

A. A little scratch over his left eye and blood running down, a very little bit.

Q. You are quite sure about that? A. Yes.

Q. Just as sure about that as anything you have testified to?

A. I remember the time he rubbed his face to rub the blood off.

Q. You are positive about that? A. Yes.

Q. Who was present at that time?

[601] A. J. T. Yelly, Jesse Murphy, J. M. Kline, myself, Jack Chambers, and John Gatty.

Q. Then those others would have had as good an opportunity to have seen that if there had been blood there? A. I suppose so.

Q. Did Mr. Clark walk off from there by himself?

A. No; they carried him a ways, probably a hundred or two hundred feet, and then he said he would try to walk, and we took hold of his arms and took him along.

Q. Did he complain of his head and face?

A. No; he complained of his hip and back, is all.

Q. No complaint about his head or eyes?

A. No, he did not say anything about his eye.

Q. What did you say your business was now?

(Deposition of Thomas J. St. Thomas.)

A Switching

Q. What company? A. Southern Pacific.

Q. Your headquarters are here in San Jose?

A. Pajaro.

Q. Which way—south from San Jose?

A. South; yes.

Mr. McFARLAND.—That is all.

Redirect Examination.

(By Mr. HARDINGE.)

Q. The cause of the accident was the fact that Mr. Kline gave the stop signal as well as the fact that the brakes were not set on these cars?

[602] Mr. McFARLAND.—I object to that as leading and suggestive.

A. Yes.

Q. Who was the first man to reach Mr. Clark after the accident? A. The fireman, Jack Chambers.

Q. And then whom? A. Mr. Kelly and myself.

Mr. HARDINGE.—That is all.

(By Mr. McFARLAND.)

Q. Did you ever make a statement in regard to this accident? A. Yes.

Q. Did you testify in that statement you made anything about any scratch above the eye or blood?

A. No.

Mr. HARDINGE.—I object to that as incompetent, irrelevant and immaterial. The statement itself is the best evidence.

(Signed) THOS. J. ST. THOMAS.

[Deposition of John Freeman.]

[603] The deposition of JOHN FREEMAN, omitting caption and certificate, is as follows:

Direct Examination.

(By L. KEARNEY.)

Question 1. What is your name, age and occupation?

Ans. John Freeman; 44 years old, and am now running an engine for the Arizona & New Mexico Railway Company.

Question 2. Were you at any time employed by the defendant in this action?

Ans. I fired an engine for them for a year or such a matter. I don't know just how long.

Question 3. Covering what period were you an employee of the defendant in this action?

Ans. 1910, I guess it was.

Question 4. What period did it cover?

Ans. It was in 1910, two years back, or a year and a half.

Question 5. Have you frequently been over the defendant's railroad track in Clifton, Arizona?

Ans. Yes, sir.

Question 6. Are you well acquainted with and have you frequently been over that 800 feet of defendant's railroad track between the Shannon switch and the defendant's railroad bridge, which crosses the San Francisco River in **[604]** the town of Clifton, Greenlee County, Arizona?

Ans. Yes, sir.

Question 7. How many times have you been over that part of the road?

(Deposition of John Freeman.)

Ans. I cannot say. I have been over it several times. I have been over it, now—a hundred times is plenty, I guess.

Question 8. State whether or not if freight-cars were left on any part or near the middle of the northerly portion of this 800 feet between said switch and bridge, they would remain in the same block without the brakes having been set, or the same blocked.

Question objected to on the grounds that it calls for an expert opinion from the witness, who has not qualified as an expert; and, secondly, has not testified whether he knows whether the cars would roll or not.

Ans. I have known cars to move near the center of the track.

Defendant moves the Court to strike out the answer of witness as not being responsive to the question.

Question 9. How many times have you known cars on which the brakes were not set thereon or blocked to run on said 800 feet of said track?

Defendant objects to the question on the ground that it assumes that the witness has seen cars run on said track without them being locked or the brakes set.

[605] Ans. One time I saw the cars run and then another time I didn't see them, but I knew they were moved. I asked the foreman how much work there was for us to do; he said quite a good deal,

(Deposition of John Freeman.)

and I said we had better cut off then and go for water.

Answer objected to on the ground that it is based on hearsay.

Question 10. About what time was it that you say the cars moved on that part of the track?

Ans. I don't remember just exactly.

Question 11. Can you fix the year?

Ans. It was 1910.

Question 12. Those cars—were they freight-cars?

Ans. Yes, sir.

Question 13. Had they been left on the track without the brakes being set?

Ans. I suppose they were for they moved.

Defendant objects to the answer for the reason that witness has no personal knowledge.

Question 14. Did you examine the cars to see if the brakes were set or not?

Defendant objects to question on the ground that witness has not qualified as an expert.

By Mr. KEARNEY.—We withdraw the question for the present.

(By Mr. KEARNEY.)

[606] Question 15. Have you had experience as a railroad man? A. Yes, sir.

Q. 16. How much experience have you had?

Ans. I have been railroading for about eight years.

Question 17. Did you ever serve as a brakeman?

Ans. No, sir.

(Deposition of John Freeman.)

Question 18. In what capacity did you serve?

Ans. As fireman.

Question 19. During the year 1910 you was fireman on the road on an engine for the defendant company as a servant of the defendant?

Ans. Yes, sir.

Question 20. You was engaged in switching cars in Clifton? Ans. Yes, sir.

Question 21. I will ask you to state that if the cars had been placed on this 800 feet of railroad track of the defendant, that we have been talking about, and the brakes set on the cars would the cars have remained on that part of the track?

Ans. Yes, sir.

Defendant objects to the question for the reason that it calls for the opinion of witness, who has not qualified [607] as an expert, don't claim to be any and does not pretend to know whether the car was rolling or whether the brakes were set or were not set.

A. Yes, sir; they will stand with the brakes on—they were supposed to set the brakes.

The defendant moves the Court to strike out the latter part of the witness' answer for the following reason: that it is not responsive to the question.

Q. 22. How would it be on that part of the track if freight-cars were placed thereon without the brakes having been set, would the cars be liable to remain on that portion of the track?

Question objected to for the reasons that it calls for the opinion of the witness, he not having quali-

(Deposition of John Freeman.)

fied as an expert; not having testified that he has any personal knowledge of the matter.

Ans. There has been cars set there without brakes on them, but at this time that I saw those cars move we didn't take all that were on the track, but we pulled away from them and they followed us down.

Question 23. Would they roll or stay there?

Ans. They would roll, probably.

Question 24. When cars are left on grades, state whether or not the rules of the defendant require the brakes to be set thereon to prevent them running away.

[608] Defendant objects to the question for the reason that the rules are the best evidence.

Ans. Yes, sir; they set the brakes.

Question 25. Do the rules require it?

Ans. Yes, sir; they require it.

Question 26. On that part of the track that we have been talking about, this 800 feet, is it the duty of the employees when cars are left on that portion of the track to set the brakes on the cars?

Defendant objects to the question unless the witness has personal knowledge of the duties of the employees inquired about.

Ans. Yes, sir.

Question 27. Did the defendant, to your knowledge, ever take any active measures to enforce such rules in regard to cars left standing on said 800 feet of said track?

Defendant objects to the question for the reason that there is no evidence that the defendant ever

(Deposition of John Freeman.)

had any knowledge of cars being left standing.

Ans. No, sir; none that I know of.

Question 28. At any time when cars had run over said 800 feet of track by reason of brakes having been set thereon was John T. Kline or John T. Kelley present, or had either of them any knowledge that cars left on said 800 feet of track were liable to run away if the brakes were not set or chocked?

[609] Defendant objects to the question on that ground that it is irrelevant and immaterial what notice or knowledge Kline or Kelley had, and the same would not be notice or knowledge to the defendant.

Ans. I am not sure whether either one of these were present or not at the time I saw those cars, and I can't say what their knowledge was regarding it.

Question 29. Do you know whether they knew that that part of the track was downgrade?

Ans. I don't know. I could not swear that they did.

Question 30. Did you, yourself, know that it was downgrade?

Ans. Yes, sir, I knew the cars would run down.

Question 31. Did Paul Reisenger, superintendent for defendant's 800 feet of this track know it was downgrade?

Defendant objects to the question, for the reason that no evidence has been introduced to show that Paul Reisenger is superintendent of said track.

Ans. I can't say that he did.

Question 32. I understand you to say that you was about a year fireman on the engine in the railway ser-

(Deposition of John Freeman.)

vice of the defendant during the year 1910?

Ans. Yes, sir, I was with Mr. Clarke that long.

Question 33. State whether or not Mr. Clark readily [610] observed signals.

Question objected to by the defendant for the reason that it is both leading and suggestive.

Ans. Yes, sir.

Question 34. What do you say, at the time you was with Mr. Clarke, as to whether his eyesight was defective?

Defendant objects to question on the grounds that it is both leading and suggestive.

Ans. It was good, so far as I know. I never saw anything wrong with it.

Question 35. I will ask you to state if you know whether the plaintiff was a careful or a careless servant for the defendant.

Defendant objects to the question, for the reason that it is irrelevant and immaterial, and is both leading and suggestive.

Ans. He was very careful in all of his work.

Cross-examination.

(By Mr. McFARLAND, of McFARLAND and HAMMOND, of Counsel for Defendant.)

Question 36. What did you say you was doing for the defendant during the year 1910?

Ans. I was firing on an engine.

Question 37. Was that engine engaged in service in the yards or the main line?

[611] Ans. In the yards.

Question. 38. Do you remember what time in 1910

(Deposition of John Freeman.)

you entered the service of the A. & N. M.,—about?

Ans. It was about March.

Question 39. 1910? Ans. Yes, sir, 1910.

Question 40. Have you continued in the service of the company up to this date? Ans. Yes, sir.

Question 41. In the same capacity?

Ans. No, sir. I worked about 18 months as hostler in Nachita.

Question 42. At the time you entered the service in March, 1910, how long did you continue in their service as fireman? Ans. As fireman?

Question 43. Yes, sir,—how long?

Ans. I was here not quite a year until I went to Hachito.

Question 44. During that time was you fireman on an engine being run by Mr. Clarke?

Ans. Yes, sir, that was my regular job.

Q. 45. You was engaged in switching in the yards during that time? Ans. Yes, sir.

Question 46. What part of that time was you engaged [612] in switching cars up there on the Shannon switch?

Ans. That was every day that I was on the engine.

Question 47. Sometimes it was more than once a day?

Ans. Yes, sir, sometimes two or three times a day.

Question 48. You was engaged each time, then, engaged in firing for Mr. Clarke? Ans. Yes, sir.

Question 49. During all that time you was engaged in firing an engine in the yards in Clifton and up the Shannon hills you only saw cars shift on the

(Deposition of John Freeman.)

switch once? Ans. That is all.

Question 50. There were cars left standing on the main line, and there were cars taken off from the main line and switched up Shannon's switch every day? Ans. Yes, sir, every day.

Question 51. When Mr. Clarke was gone, were you on the engine when this was being done?

Ans. Yes, sir.

Question 52. He had charge of the engine and cars which were to be switched and took from the main line and switched them up the Shannon switch?

Ans. Yes, sir.

Question 53. Do you know the grade between the bridge [613] and up to the Shannon switch?

Ans. No, sir.

Question 54. You don't know what the grade was at the time you was working as fireman on Mr. Clarke's engine? Ans. No, sir.

Question 55. You don't know now?

Ans. No, sir.

Question 56. Do you know on what grade a car will stand without the brakes being set?

Ans. No, sir, I don't.

Question 57. Why, then, do you say that cars would roll on that grade, and you don't know what the grade was? Ans. I saw them roll.

Question 58. Once? Ans. Yes, sir.

Question 59. There were a great many hundreds and possibly thousands of freight-cars shipped from the main line up to the Shannon hill during the time you were firing on Mr. Clark's engine?

(Deposition of John Freeman.)

Ans. Yes, sir, a good many cars. I can't say how many.

Question 60. Would you during that time shift as many as a dozen cars from the main line up to the Shannon switch each day?

Ans. I don't know whether they would average that many,—sometimes we had more, sometimes less.

[614] Question 61. You could not approximate the average very well? Ans. No, sir, not very well.

Question 62. Mr. Clarke was always on the engine when you were present as fireman?

Ans. There were times he was not.

Question 63. During the time you was fireman, how many times would you say he was not on the engine when you were switching cars from the main line up Shannon's switch?

Ans. He was always present at those times.

Question 64. And the modes and methods of switching were always the same? Ans. Yes, sir.

Question 65. Mr. Clarke knew all the modes and methods by which cars were taken from the main line to the Shannon switch? Ans. Yes, sir.

Question 66. You knew the custom of the cars being moved, left on the main line, and the custom of switching cars from the main line up to the Shannon switch? Ans. Yes, sir.

[615] [Deposition of H. B. Burke.]

The deposition of H. B. BURKE, omitting caption and certificate, is as follows:

Direct Examination.

(By L. KEARNEY, Attorney for the Plaintiff.)

Question 1. What is your name, age and occupation?

Ans. My name is H. B. Burke; my residence, Clifton, Arizona; my age, 54 years, and am a railroad agent.

Question 2. From February 1, 1911, to the present time, what position have you held with the defendant in this action?

Ans. Agent of the A. & N. M. at Clifton, Arizona.

Question 3. What has been and are your duties as such servant of the defendant?

Ans. It is to keep the accounts of the station, and any duties that come under the agent's jurisdiction.

Question 4. Have you as such servant charge of all freight records, bills of lading, invoices, shipping receipts of all freight consigned or sent in over its railroad from outside of the Territory, now the State of Arizona, and received at Clifton, Arizona, and consigned to persons at Clifton, Arizona?

Ans. I have charge of all the freight-books and freight accounts, the bills of lading going out, but we don't always get bills of lading on freight coming in, unless consigned to shippers' orders.

Question 5. Have you any records in your office of twelve certain freight-cars, some lettered A. T. & S. Fe. R. Co., meaning Atchison, Topeka and Santa

(Deposition of H. B. Burke.)

Fe Company, and some [616] lettered C. S. Ry. Co., meaning Colorado and Southern Railroad Company, and among those twelve some of the cars bearing the following numbers: 26120; 26179; 26164; 26206; 26228; 26238; 26139; 26276, which cars were loaded with coke or other merchandise billed from some point in Colorado, or beyond the State line of Arizona, and at the same time were in the defendant's yards at Clifton, Arizona, on March 15, 1911, and stamped consigned to the Shannon Copper Company at Clifton, Arizona?

Defendant objects to the question for the reason that at the date alleged there is no allegation in the plaintiff's second amended complaint or either of the complaints previously filed alleging any fact or facts showing or tending to show that the defendant was engaged at the date stated in interstate commerce, nor that the plaintiff at the date alleged was in the employment of the defendant and on said day engaged in interstate commerce.

Ans. I have the record of all except C. & S. 26276, which probably should be 26216 instead of 26276.

Question 6. Where were those cars shipped from?

Ans. Gray Creek, Colorado.

Question 7. That is, including the 12 cars I mentioned, all consigned to the Shannon Copper Company? Ans. Yes, sir.

Question 8. Were they all shipped in from Gray Creek, Colorado? Ans. The eight cars were.

Question 9. If they all contained coke would they have [617] come from Gray Creek, Colorado?

(Deposition of H. B. Burke.)

Ans. Not necessarily; they were getting coke from different places.

Question 10. Where?

Defendant objects to question for the reason that it is immaterial and irrelevant.

Ans. I think possibly some from Gray Creek, and possibly some from elsewhere, but I cannot tell without looking at the records for it.

Question 11. Were the ones of the Santa Fe lettered A. T. & S. F.? Ans. I do not know.

Question 12. Do you know whether or not there is a company known as the Atchison, Topeka & Santa Fe Railroad Company? Ans. Yes, sir.

Question 13. How does it mark its cars?

Ans. A. T. & S. F.

Question 14. Do you know of a company known as the Colorado and Southern Railroad Company?

Ans. Yes, sir.

Question 15. Do you know how it marks its cars?

Ans. C. & S.

Question 16. Does the defendant own any of those cars?

Defendant objects to the question unless witness knows of his personal knowledge.

Ans. I don't know.

[618] Question 17. From Gray Creek, Colorado, over what lines of railroad would these 12 cars, or eight cars, loaded with coke come from or over before arriving at Clifton, Arizona?

Ans. The eight cars in question came from C. & S., Fort Worth & Denver, Rock Island, El Paso & South

(Deposition of H. B. Burke.)

Western and the A. & N. M.

Question 18. This is the defendant's road?

Ans. Yes, sir.

Question 18½. The cars I have mentioned to whom were they consigned?

Ans. To the Shannon Copper Company from the shipper,—from the Victor American Fuel Company.

Question 19. From the point of Gray Creek, Colorado? Ans. Yes, sir.

Question 20. Have you copies of the shipping bills of coke brought into Clifton in any of these 12 cars?

Ans. No, sir.

Question 21. Did the defendant, on March 15, 1911, or at any time since, own any of the freight-cars which were used for carrying freight over its line of railroad, Hachita, New Mexico to Clifton, Arizona?

Defendant objects to the question on the ground that it is irrelevant and immaterial.

Ans. They have some cars; yes, sir.

Question 22. What kind of cars are these?

Defendant objects to the question on the ground that it is immaterial and irrelevant.

[619] Tank-cars, flat cars, and box-cars.

Question 23. Does the defendant own any such cars as carried coke in the said eight cars or 12 cars shipped from Gray Creek, Colorado, to Clifton, Arizona?

Ans. They have stock-cars,—coke shipped in stock-cars.

Question 24. Is it not a fact that about all the com-

(Deposition of H. B. Burke.)

merce for goods and merchandise that are shipped from points beyond the line of Arizona are brought in over the line of defendant's railroad to Clifton, Arizona, in foreign cars? Ans. Yes, sir.

Defendant objects to the question for the reasons that it is irrelevant and immaterial.

Question 25. I will ask you if, as shown on your records, the Shannon Copper Company has boughten any coke that was shipped in over the defendant's line of railroad in the Territory, now State, of Arizona?

Defendant objects to the question on the ground that it is irrelevant and immaterial.

A. Not that I know of.

Q. 26. All the coke that the Shannon Copper Company has boughten and shipped in over the defendant's line of railroad was made at points beyond the line of Arizona?

Defendant objects to the question for the reason that it is irrelevant and immaterial, and suggestive and leading.

A. So far as I know.

Q. 27. Are these papers—eight waybills from Gray Creek to Clifton—C. & S. 793, March 7, 1911; 792, same; 673, February [620] 28, 1911; 777, March 6, 1911; 775, March 6, 1911; 773, March 6, 1911; 772, March 6, 1911, true copies of the records of your office as the said agent of the defendant?

Ans. Yes sir.

Note: The above referred to waybills, eight in number, are marked respectively Exhibit "A," Exhibit

(Deposition of H. B. Burke.)

"B," Exhibit "C," Exhibit "D," Exhibit "E," Exhibit "F," Exhibit "G," and Exhibit "H," and are attached hereto and made a part hereof.

Q. 28. And that exhibit, Exhibit "A," "B," "C," "D," "E," "F," "G" and "H," contain a record of the cars inquired about and which you have stated were shipped from Gray Creek, Colorado to Clifton, Arizona, consigned to the Shannon Copper Company? Ans. Yes, sir.

Cross-examination.

(By Mr. McFARLAND, of McFARLAND & HAMMOND, Attorneys for Defendant.)

Question 29. Are the exhibits that are filed copies of the original waybills or copies of the records?

Ans. Copies of the records from the expense bills or freight bills.

Question 30. And they are copies of copies in your office and are not copies of the original bills?

Ans. Yes, sir.

(By Mr. McFARLAND.)

Defendant moves the Court to strike from the files Exhibits "A" to "H," inclusive, for the reason they are copies [621] of copies made from copies and not from the originals.

(By Mr. KEARNEY.)

Question 31. What became of the originals?

Ans. We sent them to the general offices.

Question 32. Were these copies made out in the office and are they true copies?

Ans. The expense bill was not a true copy, for the reason that the expense bills do not show all the rout-

(Deposition of H. B. Burke.)

ing, but we in making these copies get them from the bills.

Question 33. It is your duty to keep a correct record in your office, is it not? A. Yes, sir.

Question 34. These records you have produced here you know from your own knowledge to be true records? A. Yes, sir.

Question 35. How long are the records kept on file in the Auditor's office?

Ans. I don't remember the exact date now, but it is over seven years.

Question 36. Do they keep them for seven years?

Ans. Oh, yes, they keep them.

Question 37. Did you have the originals before they were sent to the Auditor's office?

Ans. Yes, sir.

Question 37. You are positive that your record of them [622] is absolutely correct?

Ans. I think so, because we have no corrections on it so far as I know. I would be willing to bank on it myself. There is no room for all this routing on there, and consequently we left it off.

Question 38. Then you would say that all the other date is absolutely correct?

Ans. Yes, sir. The routing we have generally on another book and not on this particular book.

Question 39. It is a part of your duties to keep a correct record of the same? Ans. Yes, sir.

Question 40. And that which you have testified to now is a statement of that record?

(Deposition of H. B. Burke.)

Ans. Yes, sir.

(Signed) H. B. BURKE.

[623] And the foregoing was all the evidence given, introduced, heard and exhibited at the trial of said cause.

[624] Be it remembered that during the trial of this cause the further proceedings were had: The Court instructed the jury as follows:

[Instructions.]

“Gentlemen of the Jury, in this case the plaintiff seeks to recover damages against the defendant company for certain personal injuries caused, as he alleges, by the negligence of said company. The plaintiff says in his complaint that on March 15th, 1911, he was employed by and had worked for the defendant company at Clifton, Arizona, as a locomotive engineer. That on said day he was in charge of and operating as such engineer a switch engine of the defendant. That while so at work he and certain of his fellow-employees were engaged in moving a train of freight-cars from the yards of the defendant to the Shannon Smelter by way of what is known as the Shannon switch. That in the course of such work four of said cars were cut from the train and left standing on the main track of defendant's road without the brakes being set thereon or otherwise blocked. That soon thereafter, and while plaintiff was backing his engine with the attached cars on to said Shannon switch, the said four cars moved from the place where they had been placed and collided with said engine, and that as a result of said collision

plaintiff then and there received divers severe bodily injuries. That the defendant company failed in its duty to plaintiff in that its employees, fellow-servants of plaintiff, did not exercise due and reasonable care in the respect that [625] the brakes were not set upon said cars, or other available means taken to prevent their moving, and that the grade of such track at the place where said cars were placed, was such as to require the setting of said brakes, or the blocking of said cars, in some other way to securely hold said cars at the place where they had been so placed; and that the failure and neglect of the defendant, through its said employees, constituted negligence. The complaint further states that the employees of the defendant whose duty it was to warn plaintiff of any danger and of any unsafe setting of said cars failed to warn plaintiff of the danger, but gave him the wrong signal, and that the failure and neglect of the defendant, through its said employees, in the respects mentioned, constituted negligence, and constituted the direct and proximate cause of the collision and of the injuries received therein by plaintiff.

“The defendant in its answer denies that it was guilty of any negligence in the premises, and further alleges that any injuries plaintiff may have suffered at the time and on the occasion in his complaint set forth, were caused by his own negligence and want of care, and not by reason of the negligence or want of care of the defendant, its agents and servants. Defendant further sets up in its answer that any injury the plaintiff may have received was wholly the

result of the ordinary risks of said employment open to his observation, and hence were known to him or could have been known to him by the use of [626] ordinary care.

“Now, gentlemen, you will observe from the issues thus stated that negligence must be proven and established as the basis of any recovery in this case. Now, in a general sense, negligence is the absence of ordinary care—or, negligence may be otherwise defined as doing something which, under existing circumstances and conditions, a person of ordinary care and prudence would not do, or, on the other hand, omitting to do something which, under the existing circumstances and conditions, a person of ordinary care and prudence would have done. Whether negligence exists in any particular state of facts is a question for the jury, and so in this case it is for you gentlemen to say whether negligence has been established as charged in the complaint under the definition of negligence I have given you. Now, this case is governed by the acts of Congress approved April 22d, 1908, which, among other things, provided that every common carrier by railroad in the Territories shall be liable in damages to any person suffering injury while he is employed by such carrier in any of said Territories, when such injury be occasioned in whole or in part by reason of the negligence of any of the officers, agents, or employees, of such carrier, or by reason of any defect or insufficiency due to its negligence in its cars, engines, appliances, track, roadbed, works, or other equipment. The Statute further provides that in actions brought

against any such [627] common carrier by railroad under or by virtue of any of the provisions of the act to recover damages for the personal injury to an employee, the fact that the employee may have been guilty of contributory negligence shall not bar a recovery, but the damages shall be diminished by the jury in proportion to the negligence attributable to such employee. That is to say, the force of that statute is somewhat as follows (and perhaps can be best illustrated in this way) : If the plaintiff be guilty of contributory negligence, and his negligence and that of the defendant company be equal, the jury will then give an award of one-half of the damages it would have given if he had been free from negligence; or if he be twice as negligent as the defendant company, then one-third would be the proportion of the damages he shall receive, and so on, whatever the proportion may be.

“Now, gentlemen, under the issues raised by the pleadings in this case, you will consider whether the freight-cars which were being removed to Shannon Smelter were left on an inclined grade in defendant’s track without the brakes having been set thereon or the same blocked to prevent their escape and possible collision with the engine on which the plaintiff was, and whether or not such failure to set such brakes or apply such blocks or brakes under the circumstances constituted want of ordinary care and constituted negligence. And you will also consider whether or not the employee whose duty it was [628] to warn the plaintiff at the time and place of any approaching danger, failed in his duty in that

respect by reason of failing to give the plaintiff the right and proper signal, and whether or not, if you so find, that constituted negligence under the circumstances. And if you find that defendant, through its agents and employees, in either or both of the particulars mentioned, was guilty of negligence, you will then determine whether or not such negligence was the direct or proximate cause of plaintiff's injuries. And these are the primary issues of fact which you are to consider in this case.

“Now, as I called your attention in stating the issues, the defendant sets up as a defense what is known as the assumption of risk. That is to say, it alleges that the defendant, in entering the employment of plaintiff and in remaining in its said employment, assumed the risks ordinarily incident to his said employment which he knew as an intelligent and reasonable person, or by the exercise of ordinary care would have known, and by remaining in his said employment with such knowledge, he took the chances or the risks incident to such employment. Now, I charge you in this behalf that the doctrine of assumption of risk means that if the company is guilty of negligence and that negligence produces a state of affairs that is dangerous, but that dangerous condition is open and apparent, then an employee who goes to work under those circumstances when the risks and dangers are open and apparent so [629] as to be readily observable by a person of his intelligence, by going to work without objection, he assumes that risk involved in that dangerous condition and cannot hold the company responsible for

even a defective condition. But that principle of assumption of risk does not apply unless the danger is one that is so open and obvious as to be readily observable by a person of ordinary intelligence in his situation by the exercise of his powers of observation so far as consistent with his duty as such employee. Another condition affecting the doctrine of assumption of risk is that the plaintiff must not only have seen the dangers but also have appreciated them. In determining this question, you have a right to take into consideration the nature of the employment the plaintiff was engaged in, and whether the duties of such employment prevented the plaintiff from making a close inspection, his opportunity to observe and take notice of the dangers of his employment at the time injured, and whether or not his opportunity for making such close inspection of the dangers was in any way affected by his other duties, and whether the requirements of his services as such engineer also affected his capability of comprehending the dangers which might otherwise have been more plainly visible to one not so engaged.

“Now, to the doctrine of assumption of risk, it should be added that if certain of the dangers or dangerous conditions attending the work were so open and apparent that [630] the plaintiff could be held to assume the risk under the rule I have stated, but if there were other dangers not open and visible, and but for this latter class of dangers the injuries would not have happened, then the fact that he is chargeable with the assumption of risk in a portion

of the dangers would not prevent recovery if the dangers with which he is chargeable would not in themselves have produced the injury.

“To the doctrine of assumption of risk should be added the further qualification that the plaintiff did not assume the risk of any danger which arises in whole or in part from the negligence of any officer, agent or employee of the defendant.

“Now, if you find that the defendant was guilty of negligence in the particulars mentioned which directly contributed to the collision in which the plaintiff was injured, then you will consider the further question whether or not the plaintiff was guilty of contributory negligence. By contributory negligence is meant that the plaintiff himself in and about this occurrence was guilty of lack of ordinary care—in other words, guilty of negligence—and that the plaintiff’s negligence contributed to the production of the injury so that without it the injury would not have occurred. If you find that a state of affairs existed so that but for the negligence of the plaintiff the accident would not have occurred, you will find he was guilty of contributory negligence. That [631] is, subject to the qualifications that if the contributory negligence or the negligence of the plaintiff was so willful and of such a character as that the jury might say it was the direct and proximate cause of the injury, then the plaintiff may not recover by reason of such negligence. The distinction between the two cases being that the negligence of the plaintiff in the one case, instead of being merely a contributing cause, was so gross, so willful

and extended to such an extent as that the jury may say it was the proximate and direct cause of the injury. If you so find it will be your duty to ascertain in what degree the negligence of the two parties contributed to bring about this result, and you will then diminish the amount of recovery by taking the full amount of damages which otherwise you would award and reduce it by the proportion in which the negligence of the plaintiff contributed to the injury, if you find he was guilty of contributory negligence under the definition of that term as I have given it to you.

“Now, the burden is upon the plaintiff to prove that the defendant was guilty of negligence and that that negligence caused the injury. The burden of proving the defense of contributory negligence is upon the defendant. By burden of proof I mean this: that the party who has the burden of proof must make out his case by a preponderance of the evidence—must make out the contention which it alleges—which he or it alleges—by a preponderance of [632] the evidence. By preponderance is meant the greater weight of the evidence—the more convincing force, or the greater probability. If you find on any question that the party having the burden of proof has made that out under all the evidence, taking into consideration all the evidence produced on both sides, so that the affirmative of that proposition seems more probable than the negative, then the burden of proof has been made out; but if there seems to be a greater probability of the negative, then the person having the burden of proof has

not made it out.

“The plaintiff did not assume the risk of the negligence of the defendant company for whom he was working, nor any of its servants, except such as I have already charged you was of such a nature as that he must be presumed to have known and appreciated it and assumed it as a necessary incident to his employment. The plaintiff had a right to assume not only that the railroad company defendant would perform its duty, but the plaintiff had a right to assume that each of the other employees would perform their duty, and if, while in the exercise of ordinary care, the plaintiff was injured by the negligence, in either or both of the particulars mentioned heretofore, of the defendant for whom he was working, or by the negligence in whole or in part of any of the servants of the defendant, plaintiff has a right to recover. And if you find from the evidence in this case that the plaintiff, Thomas P. Clark, while in the exercise of ordinary care, [633] relied upon the other servants performing their duties and was injured by the negligence in whole or in part of some other servants of the defendant in either or both of the particulars mentioned, your verdict must be for the plaintiff.

“If you believe from the evidence that the plaintiff, Thomas P. Clark, was in the defendant’s employ as engineer on one of its engines and that while so employed he was injured by a collision between such engine and loose cars on the main line of the defendant’s railway or at the switch as alleged in plaintiff’s complaint; and if you further believe from the evi-

dence that the said cars escaped and ran down upon the main line, and that said cars while set out on the main line were on an inclined grade and did not have the brakes set or wheels blocked, and this failure to properly set the brakes or chock the wheels caused these cars to escape from such point; and if you further believe from the evidence that the defendant or its servants while in charge of said cars negligently permitted said cars to be and to remain upon said track at said point without having the brakes set or the wheels blocked, and that the failure to have the brakes set or the wheels blocked, if you believe there was such failure, was negligence on the part of the defendant, and that such negligence, if any, was the proximate cause of the collision and plaintiff's injuries, then you will find a verdict for the plaintiff.

[634] "I charge you further, gentlemen, that if at and immediately prior to the collision, the defendant company, by its switching foreman, promptly gave the plaintiff such warning signals as to a competent switching foreman would appear to be the best means of avoiding injury to the plaintiff, then the defendant company was not guilty of negligence in the giving of such warning and signals, even if it should afterwards appear that the danger might have been better averted by other or different warnings and signals.

"If the jury believes from the evidence of the condition of the track upon which the four cars in question were left standing was such that the defendant company did not know or had no reasonable ground

to believe that the said four cars would move toward the Shannon switch without motive power applied to them, then the defendant company was not guilty of negligence in leaving said cars on said track without setting the brakes thereon or otherwise obstructing the wheels of said cars.

“I charge you further that even if defendant left cars under the circumstances detailed in this case on the main line with the brakes unset, and if the cars by reason of gravity did move to and upon the switch to the point of collision, yet if plaintiff was warned of danger and was given a signal which required him to immediately stop his engine, and if he had promptly obeyed such danger [635] signal he could with the means at his disposal have stopped his engine and thus avoided the collision, and he then wilfully or purposely did not do so, then the negligence of the defendant, if any, is not the proximate cause of the alleged injury, and the plaintiff cannot recover.

“The defendant company is not required to use every possible means to insure the safety of its employees. If the jury believe that in this case the defendant used such care in the operation of the cars in question as a prudent man would use for his own safety, then the defendant company was not guilty of negligence and you should find for the defendant.

“The mere fact that the four cars left on the defendant’s main track, without apparent cause moved after they had been stopped and the engine detached, does not of itself establish negligence on the part of the defendant company.

“If you believe that it was not reasonably to be expected under all the circumstances of the case that the cars in question would move, and that such movement could not have been reasonably foreseen, then it was not negligence in the defendant to so leave him.

“The burden of proof is upon the plaintiff to establish by a preponderance of the evidence that the defendant company was guilty of negligence, and that such negligence was the proximate or immediate cause of the [636] injury complained of; and unless you believe that the plaintiff has established by a preponderance of the evidence in this case that the defendant was guilty of negligence, your verdict must be for the defendant.

“If after a consideration of all the evidence in the case, the jury believe that reasonable care for the safety of its employees did not require that the brakes should have been set or the wheels chocked on the four cars left on the main track of the defendant company while switching other cars up Shannon switch, and that the defendant company through its employees gave prompt notice to the plaintiff of the danger as soon as said four cars were discovered to be moving and made every reasonable effort to avoid the accident, then the defendant was not guilty of negligence and your verdict should be for the defendant.

“In case you find the issues in this case against the defendant you should then consider what injuries were suffered by the plaintiff in consequence of the collision in question and the burden is upon the plaintiff to prove by a preponderance of the evidence

that the injuries he complains of were the proximate result of the collision in which the plaintiff was injured, and you should award the plaintiff no damages for any injury or defect or affliction not proven by a preponderance of the evidence to be the proximate result of the injuries received in the collision in question.

[637] “If you believe the loss of sight of one eye complained of by the plaintiff was not caused by injuries received by plaintiff in the collision in question, but that such loss of sight either existed before such collision or resulted from disease of the plaintiff or other causes or existing before such collision, you should award plaintiff no damages by reason of such loss of sight.

“If after a consideration of all the evidence in the case you find the defendant company was guilty of negligence and that such negligence was the cause of or contributed to the injury suffered by plaintiff, if you further believe that the plaintiff was also guilty of negligence and that such negligence contributed to the causing of his injuries, then you should diminish the amount of damages you would otherwise award the plaintiff in proportion to the amount of negligence attributable to the plaintiff.

“The Court instructs the jury that if they find for the plaintiff and allow him damages, you should, subject to the rule stated as to the proper deduction in the case of contributory negligence on the part of plaintiff, allow him such sum as you believe from the evidence will compensate him for the injuries sustained; and in estimating his damages, you will take

into consideration the mental and physical pain suffered, if any, consequent upon the injury received, and the reasonable value of time lost, if any, consequent upon his injuries, including his reasonable [638] expenses for medical services, medicine and nurse hire, and the impairment of his eyesight or other physical injury, if any, consequent upon the injuries received.

“And if you believe from the evidence that his injuries are permanent and will disable him to labor and earn money in the future, or his physical condition has been impaired to labor and earn money in the future, then you may, in addition to the above, find such further sum as will be a fair compensation for his diminished capacity, if any, to labor and earn money in the future.

“In the ascertainment of damages the law does not lay down any definite mathematical rule. It says that you must be governed by sound sense and good judgment and make such award of damages as would be just compensation.

“Now, I submit two forms of verdict in this case. One to be returned in case you find for the plaintiff, and it will be subsequently as follows: ‘We, the jury duly empanelled and sworn in the above-entitled action, on our oaths find for the plaintiff and assess such damages as you award him.’ If your verdict be for the defendant, then you will use a similar form ending in the words, ‘do find for the defendant.’ ”

The defendant in accordance with the permission of the Court theretofore granted it so to do, as before stated, in this bill of exceptions now upon the tender-

ing of this bill of exceptions states more fully and in detail the objections to said instructions as follows:

[Objections to Instructions.]

“But that principle of assumption of risk does not apply unless the danger is one that is so open and obvious [639] as to be readily observable by a person of ordinary intelligence in his situation by the exercise of his powers of observation so far as consistent with his duty as such employee. Another condition affecting the doctrine of assumption of risk is that the plaintiff must not only have seen the dangers but also have appreciated them. In determining this question, you have a right to take into consideration the nature of the employment the plaintiff was engaged in, and whether the duties of such employment prevented the plaintiff from making a close inspection, his opportunity to observe and take notice of the dangers of his employment at the time injured, and whether or not his opportunity for making such close inspection of the dangers was in any way affected by his other duties, and whether the requirements of his services as such engineer also affected his capacity of comprehending the dangers which might otherwise have been more plainly visible to one not so engaged.

“Now, to the doctrine of assumption of risk, it should be added that if certain of the dangers or dangerous conditions attending the work were so open and apparent that the plaintiff could be held to assume the risk under the rule I have stated, but if there were other dangers not open and visible, and but for this latter class of dangers the injuries would

not have happened, then the fact that he is chargeable with the assumption of risk in a portion of the dangers would not prevent recovery if [640] the dangers with which he is chargeable would not in themselves have produced the injury.

“To the doctrine of assumption of risk should be added the further qualification that the plaintiff did not assume the risk of any danger which arises in whole or in part from the negligence of any officer, agent or employee of the defendant.”

Because the grounds stated by the Court as exceptions to the general rule of the assumption of the risk as set forth in that particular charge of the Court as above stated are erroneous and do not constitute exceptions to the general rule of law on this subject. The only exception to the general rule of the assumption of the risk is, where the employee, with the knowledge of the defective or dangerous conditions incident to the service in which he is engaged, complains to the employer of the defective and dangerous condition and the employer promises to remedy or remove such dangerous or defective conditions, the employee may remain in the service of the company for a reasonable time for the employer to fulfill this promise, and during this period should injury occur, the employee would be relieved of the operation of this rule.

Defendant further objected to that part of the charge [641] as follows:

“To the doctrine of assumption of risk should be added the further qualification that the plaintiff did not assume the risk of any danger which arises in

whole or in part from the negligence of any officer, agent or employee of the defendant," for the reason that the assumption of the risk is expressly limited by said instructions to defects of the works of the defendant and does not include the risks incidental to the operation of the business of the defendant which are open and obvious and were known to the plaintiff, and for the further reason that by section 4 of the Federal Employers' Liability Act of 1908, the only limitation of the principle of the assumption of the risk is where the injury or death of the employee results from the failure of the employee to observe the commands of the statute enacted for the safety of employees.

Be it further remembered that during the trial of this cause the further proceedings were had: The Court, in its charge, among other instructions, gave the following:

"That is to say, the force of that statute is somewhat as follows (and perhaps can be best illustrated in this way): If the plaintiff be guilty of contributory negligence, and his negligence and that of the defendant company be equal, the jury will then give an award of one [642] half of the damages it would have given if he had been free from negligence; or if he be twice as negligent as the defendant company, then one third would be the proportion of the damages he shall receive, and so on, whatever the proportion may be."

For the reason that it was an evasion by the Court of the province of the jury in determining the proportion of the damages that should be diminished by

the jury due to the negligence attributable to the plaintiff.

Be it further remembered that at the trial of said cause and after the Court had instructed the jury as hereinafter stated, the defendant excepted to that part of the instructions of the Court reading as follows:

“That is, subject to the qualifications that if the contributory negligence or the negligence of the plaintiff was wilful and of such a character as that the jury might say that it was a direct and proximate cause of the injury, then the plaintiff could not recover by reason of such negligence. The distinction between the two cases being that the negligence of the plaintiff in the one case, instead of being a contributing cause was so gross, so wilful and extended to such an extent that the jury may say it was the proximate and direct cause of the injury.”

[643] For the reason that there was evidence in the case tending to show that if the plaintiff had obeyed, as he was required to do under the rule of the railroad company and of the universal practice in like cases, of which the plaintiff had full knowledge, a signal denoting danger and requiring of him to instantly stop, and that if he had obeyed such signal, he could have stopped and averted the injury, that the charge erroneously instructed the jury, in effect, that such omission to obey such signal and order must have been wilful and intentional, whereas if the injury was the result of his negligent omission to obey said signal, such negligence was the proximate cause of his injury.

Be it further remembered that at the trial of this cause and at the proper time and before the jury retired, the defendant requested the Court in writing to instruct the jury as follows:

**[Instructions Requested by Defendant and
Refused.]**

“If you should believe from the preponderance of the evidence in this case that the defendant permitted the cut of four cars to remain upon the main line after the engine had been detached therefrom, without having set the brakes thereon or having chocked the wheels so as to prevent their rolling by their own gravity, and if the plaintiff was apprized of danger of any kind by a signal which the plaintiff knew signified an emergency under the [644] practice in the operation of railroads in like circumstances was equivalent to an order by the defendant to stop as quickly as the appliances and means of operation under the control of the plaintiff would enable him to stop, and if it appears that the plaintiff could have stopped and so avoided the collision from which his alleged injuries resulted, and that he failed to do so, the proximate cause of the injury was his own negligence, and he cannot recover in this case.” Which instructions requested by the defendant were by the Court refused, to which action of the Court the defendant then and there excepted.

Be it further remembered that at the trial of said cause and at the proper time and before the time for the jury to consider of their verdict, the defendant requested the Court in writing to give the jury the following instruction:

“If you believe that the movement of the four cars in question could not, under all the circumstances, have been reasonably prevented, then such movement must be attributable to accident, and if such movement was an accident the defendant is not liable in this case.” Which instruction requested by the defendant was by the Court refused, to which action of the Court the defendant then and there excepted.

[645] Be it further remembered that at the trial of this cause and at the proper time and before the retirement of the jury to consider of their verdict, the defendant requested the Court in writing, in the presence of said jury, to give to the jury the following instruction:

“Even if the defendant left cars under the circumstances detailed in this case, on the main line with the brakes unset, and if the cars by reason of gravity did move to and upon the switch to the point of the collision, yet if the plaintiff was warned of danger, or was given a signal which required him to immediately stop his engine within time had he promptly obeyed the signal to have stopped, and thus avoid the collision, and he negligently, or purposely, did not do so, then the negligence of the defendant, if any, is not the proximate cause of the alleged injury, and the plaintiff cannot recover.” But the Court refused to give said instruction, to which ruling of the Court in so refusing to give said instruction the defendant then and there excepted.

Be it further remembered that at the trial of this cause and at the proper time and before the jury

had retired to consider of their verdict, the defendant requested the Court in writing to give to the jury the following instruction:

“If after giving consideration to the condition of [646] the tracks in question and all the surrounding facts and circumstances proven in the case, the jury believes that at the time of the accident in question the condition of the track in question and the handling and moving of the cars in question thereon was being performed in the manner usually adopted in well-managed and operated railroads and generally recognized as good railroading, then the defendant was not guilty of negligence in so maintaining its railroad and operating its cars thereon in the manner in which it did so.” But the Court refused to give said instruction, to which ruling of the Court in refusing to give such instruction the defendant then and there excepted.

Be it further remembered that at the trial of this cause and at the proper time and before the jury retired to consider of their verdict, the defendant requested in writing the Court to give to the jury the following instruction, that is to say:

“You are instructed that one entering into the service of the defendant with knowledge, actual or constructive, of the defects in the defendant’s roadbed, or knowledge, actual or constructive, of the methods employed by the defendant in the operation of its cars in switching upon its main line, switches and industrial tracks, and remains in the service of the defendant with such knowledge, [647] actual or constructive, without complaint, that he assumes all

ordinary risks incident to his employment, and if injury results from such defects in its roadbed or by such methods of operation of its cars, that by such acquiescence he assumes the risk of injury, and cannot recover." Which instruction the Court refused to give, to which ruling of the Court the defendant then and there excepted.

And time was given, as hereinafter stated, within which the defendant could prepare and file its bill of exceptions to said rulings.

[Recital Re Exhibits.]

[647a] (Copy of Plaintiff's Exhibit 1 and endorsements, original of which is transmitted in accordance with stipulation of counsel.)

(Copy of Plaintiff's Exhibit 2 and endorsements, original of which is transmitted in accordance with stipulation of counsel.)

(Copy of Defendant's Exhibit "B" and endorsements, original of which is transmitted in accordance with stipulation of counsel.)

(Copy of Defendant's Exhibit "A" and endorsements, original of which is transmitted in accordance with stipulation of counsel.)

[Order Extending Time to File Bill of Exceptions.]

[648] And be it further remembered that on the 22d day of November, and within the time allowed by the rules of this court for the preparation, allowance and filing of bills of exceptions, the parties to this cause, by their respective counsel, appeared in open court, and thereupon, upon motion of the defendant, further time, to wit, ten days from and after the 26th day of November, 1912, was given the de-

fendant by the Court within which to prepare, present and file its bill of exceptions to the rulings of the Court made at the trial of this cause.

And now, within the time aforesaid, so allowed therefor, to wit, on the 6th day of December, 1912, the defendant does now present this, its bill of exceptions, and asks that the same may be examined, approved and allowed by the Court, and filed and made and deemed to be and held a part of the record in this cause.

[Order Settling and Approving Bill of Exceptions.]

And on the 2d day of January, 1913, in the presence of the parties in open court, this being the day fixed by the Court therefor, the foregoing bill of exceptions is settled and approved by the Court, and, having been engrossed, now is signed and directed to be filed and made a part of the record of said cause.

Done in open court this 6th day of January, 1913.

RICHARD E. SLOAN,

Judge U. S. District Court for the District of
Arizona.

[649] [Endorsements]: #14. (34.) Thomas P. Clark, Plaintiff, vs. The Arizona & New Mexico Railroad Co., a Corporation, Defendant. Bill of Exceptions. Served on W. M. S. Dec. 6, 1912. W. M. Seabury. Copy. Filed Dec. 21, 1912. Allan B. Jaynes, Clerk. Filed as engrossed and signed this 6th day of January, 1913. Allan B. Jaynes, Clerk.

**[Acknowledgment of Service of Draft of Proposed
Bill of Exceptions.]**

[650] *In the District Court of the United States
 for the District of Arizona.*

THOMAS P. CLARK,

Plaintiff,

vs.

ARIZONA & NEW MEXICO RAILWAY CO.,
Defendant.

The plaintiff hereby acknowledges service upon him this day of a draft of a proposed bill of exceptions in the above-entitled cause.

Dated Phoenix, this 6th day of December, 1912.

L. KEARNEY,

By W. M. SEABURY,

Plaintiff's Counsel.

[Endorsements]: No. 14. (32.) United States District Court, District of Arizona. Thos. P. Clark vs. A. & N. M. Ry. Co., Plff. Acknowledges Drft. of Defts. Proposed Bill of Exceptions. Filed Dec. 6, 1912. Allan B. Jaynes, Clerk. By Frank E. McCrary, Deputy.

*In the United States District Court for the District
of Arizona.*

AT LAW.

THOMAS P. CLARK,

Plaintiff,

vs.

THE ARIZONA AND NEW MEXICO RAILWAY
COMPANY,

Defendant.

Petition for Writ of Error.

And now comes the Arizona and New Mexico Railway Company, defendant in the above-entitled cause, and says that on [651] the 18th day of October, 1912, this Court entered judgment herein in favor of the plaintiff and against this defendant for the sum of Twelve Thousand Six Hundred Seventy-five (\$12,675.00) Dollars and costs of suit, in which judgment and the proceedings had prior thereto in this cause, certain errors were committed, to the prejudice of this defendant, all of which will more in detail appear from the assignment of errors which is filed with this petition.

WHEREFORE, this defendant prays that a writ of error may issue in this behalf, out of the United States Circuit Court of Appeals for the Ninth Circuit, for the correction of errors so complained of, and that a transcript of the records, proceedings, and the papers of this cause, duly authenticated, may be sent to said Court of Appeals.

W. C. McFARLAND,

KIBBEY & BENNETT,

Attorneys.

*In the District Court of the United States for the
District of Arizona.*

THOMAS P. CLARK,

Plaintiff,

vs.

ARIZONA & NEW MEXICO RAILWAY COM-
PANY, a Corporation,

Defendant.

Assignment of Errors.

The defendant, the Arizona & New Mexico Railway Company, in connection with and as a part of its petition for a writ of error filed herein, makes the following assignments of [652] error which it avers were committed by the Court in the rendition of the judgment against the defendant and in the proceedings in said cause before and after the rendition of said judgment appearing in the records herein, that is to say:

I.

The Court erred in holding and deciding that the complaint and each count thereof stated facts sufficient to constitute causes of action against the defendant.

a. In this, it alleges no duty of the defendant and a breach thereof.

b. That the complaint nor either count thereof allege that the injury complained of was not one resulting from a risk assumed by the plaintiff in his employment.

c. That it appears from the allegations in each of

the two counts of said complaint that the defects complained of were open, obvious and apparent to one of ordinary intelligence.

d. That neither count of said complaint alleges that plaintiff did not know before and at the time of the injury of which he complains of the defect and insufficiency in the cars, roadbed, works, engines, appliances, tracks and other equipment of defendant or in the manner of the operation of its business, which may have caused or contributed to the cause of his injury.

That the Court erred in overruling defendant's objection made at the beginning of the trial, to the introduction of any evidence under either count of the complaint, because neither [653] count states facts sufficient to constitute a cause of action as specified in the first assignment of error.

II.

The Court erred in overruling defendant's special demurrer to plaintiff's complaint and each count thereof, because no facts were averred constituting negligence on the part of defendant in respect to its alleged failure to employ a sufficient number of brakemen, defective and unsafe roadbed, defective and unsafe coupling apparatus, failure to inspect, safe place, nor negligent and careless management of its cars and operation; nor does said complaint nor either count state facts showing or tending to show that the alleged defects caused or contributed to the cause of the injury complained of.

III.

In overruling defendant's motion to make said

complaint and each count thereof more definite and certain, by stating facts definitely and with certainty in what respect the number of brakemen employed by defendant was insufficient, and how said insufficiency, if any, caused or contributed to plaintiff's alleged injury; in what respect the roadbed was defective and unsafe, and how such defective and unsafe roadbed, if any, caused or contributed to the cause of plaintiff's alleged injury; in what respect was the coupling apparatus out of repair or unsafe, and how said want of repair or unsafe condition caused or contributed to cause the alleged injury; in what respect defendant failed to furnish plaintiff [654] a safe place in which to perform his work, and how such unsafe place, if any, caused or contributed to cause plaintiff's alleged injury; in what respect defendant and its servants negligently and carelessly ran, managed and operated its cars and engine, and how said careless and negligent operation, if any, caused or contributed to cause the alleged injury.

IV.

That the Court erred in overruling defendant's motion to strike out plaintiff's second amended complaint from the files because each count thereof is a duplication, in this, that thirteen separate and distinct causes of action are alleged in each of said counts, involving defendant's liability under the common law and two federal statutes; one the "safety appliance act," and the other the "Employer's Liability Act," each of said alleged causes of action requiring different proof to sustain and to

each of said causes of action separate and distinct defenses may be interposed; and as to said second count because the several separate and distinct causes of action therein are merely a summary of the several causes of action alleged in said first count.

V.

That the Court erred in overruling defendant's objection to any evidence in the cause, because said complaint nor either count thereof does not state facts sufficient to constitute a cause of action against the defendant, for the same reasons set forth under assignment of errors No. 1.

[655] VI.

That the Court erred in denying defendant's motion made at the close of plaintiff's evidence for a directed verdict for the defendant, for the reason that the causes of action, if any, of plaintiff, as alleged in the first and second counts of his said amended complaint, are based upon the first section of the "Employer's Liability Act," approved April 22d, 1908, in respect to injuries received by employees engaged in interstate commerce, and the evidence at the close of plaintiff's case failed to show that defendant and plaintiff were engaged in interstate commerce at the time of the alleged injuries. The undisputed evidence in the cause shows that plaintiff and defendant were engaged, at the date of the alleged action, in switching cars in its railroad yards at Clifton.

VII.

That the Court erred in sustaining plaintiff's ob-

jection to and excluding the testimony of witness Kelly offered by the defendant, by whom defendant proposed to show carelessness of plaintiff in handling his engine and disobeying signals while operating his engine in switching cars in the yards of defendant to sustain plaintiff's carelessness and negligence, defendant propounded to witness the following questions and the witness made answer thereto as follows:

Q. How long has Mr. Clark been operating that engine in switching cars there in that yard?

A. Well, I think up to that time about two years Mr. [656] Clark had been on that engine, around about that time, as regular engineer—what we call regular man on the engine.

Q. Do you know whether he is a careful or negligent man—engineer—in the operation of his engine in switching cars?

Mr. SEABURY.—We object to the question as incompetent, irrelevant and immaterial.

The COURT.—I sustain the objection.

Mr. McFARLAND.—We except to the ruling of the Court.

(To the witness.)

Q. Do you know of any instances prior to the accident, any within the space of two years, where he was negligent and careless in the operation of his engine in respect to obeying signals?

Mr. SEABURY.—We make the same objection.

The COURT.—Same ruling.

Mr. McFARLAND.—We except. Now, if the

Court please, we offer to prove by this witness that Mr. Clark for two years previous to this injury by this accident was habitually careless and negligent in obeying signals given him while operating his engine in switching cars in the yards of the defendant. We offer further to show by this witness that in many instances which occurred possibly almost within two years previous to the happening of this accident that he uniformly and habitually disobeyed signals given to him as engineer in the operation of his engine and this train while switching in these yards.

[657]¹ Mr. SEABURY.—We object to the offer and again respectfully protest against its being made and ask that it be excluded.

The COURT.—The ruling will stand.

Mr. McFARLAND.—It is denied?

The COURT.—Yes.

Mr. McFARLAND.—To which we except.

VIII.

That the Court erred in sustaining the objection of plaintiff to and excluding the testimony of witness Kline offered by defendant, by whom defendant proposed to show the general reputation of plaintiff as a safe and conservative engineer or as to his general reputation as a careless, reckless engineer. For the purpose of eliciting this testimony, defendant propounded to witness the following questions to which the witness made answer thereto as follows:

Q. You say you have known Thomas Clark how long? A. About fifteen or sixteen years.

Q. At Clifton?

A. No. I knew him in the Indian Territory.

Q. How long have you known him in Clifton?

A. A little over twelve years.

Q. Do you know his general reputation as to being a safe and conservative engineer or as to his reputation of being a reckless engineer in the operation of his engine?

Mr. SEABURY.—We object—it is clearly incompetent and [658] inadmissible.

The COURT.—I sustain the objection.

Mr. McFARLAND.—We except to the ruling of the Court.

(To the witness.)

Q. Do you know whether his methods and mode of operating his engine is of a safe and conservative character—I withdraw that—whether his mode of operating his engine in the yards of the company in switching cars is careful, or whether his method and mode of operating his engine in switching cars in the yards of the company is reckless and careless?

Mr. SEABURY.—We make the same objection, and we further object to the repeated offer of evidence which counsel must know to be incompetent, solely for the purpose of putting such inferences into the jury's mind—that constitutes reversible error.

Mr. KIBBEY.—We think that that statement is entirely uncalled for—we think this is competent evidence.

Mr. SEABURY.—We can't conceive of that being competent evidence.

The COURT.—Upon what theory do you think it is competent?

Mr. McFARLAND.—On his method and mode of operating his engine—he said he was careful.

The COURT.—Careful in what particular instances?

Mr. McFARLAND.—Generally.

[659] The COURT.—I don't recollect that he was asked as to that.

Mr. McFARLAND.—That goes to the question as to whether he was a careful, painstaking operator with his engine, or whether he was a careless and reckless man.

The COURT.—Suppose he was careless and reckless—you seek to establish something from which it may be inferred that he was careless and reckless in this particular instance?

Mr. McFARLAND.—Yes, sir, a fact from which the jury may infer whether this was careless and reckless or not.

Mr. BENNETT.—It seems to me the evidence is admissible in this view of the matter: Mr. Clark testified as also did Mr. Chambers, the fireman, that immediately on receiving the washout signal he shut off the steam and applied the air. The witness now on the stand testified that it was impossible for him to testify that that was true, he did testify that the exhaust was working when the engine reached the place of collision, which, if true, contradicts the statement of Mr. Clark that he shut off the steam. Now, in order, then, that the jury may determine which of these facts are true, the usual, habitual conduct of Mr. Clark in the operating of his engine or his usual and habitual manner of operating his en-

gine in such yards would be illustrative and would enable the jury to determine which would be the most likely to be true.

The COURT.—Possibly if this witness knows of instances of carelessness, that might go to the jury, but I doubt whether his opinion as to whether he is a safe operator is competent [660] evidence. I don't know of any instance where one workman was permitted to state his opinion as to whether the other fellow was a safe workman or not, or whether he had that reputation or not, unless that be the issue, as for instance, whether the employer was negligent in hiring him or suffering him to work so as to injure the lives of other workmen; but as establishing whether in a particular instance a workman was careless or otherwise, I know of no instance where proof of general reputation of that is admissible.

Mr. BENNETT.—Possibly not general reputation, but I understand he worked with Mr. Clark in the same switching crew and that he did know of his usual and general conduct in reference to switching and in handling his engine.

The COURT.—I should think as far as the matter could go in that way would be to admit proof of instances of like omissions to take the ordinary methods of caution, but not his impression—not his opinion—as to that matter.

By Mr. McFARLAND.—Note our exception.
(To the witness.)

Q. Do you know of Mr. Clark's habits—I withdraw that. Do you know whether as a general rule

Mr. Clark obeyed signals or whether he ignored signals?

Mr. SEABURY.—We object to the question as incompetent, irrelevant and immaterial.

The COURT.—I think that the objection is equally good to that question.

[661] Mr. McFARLAND.—We except.

(To the witness.)

Q. Do you know of instances where Mr. Clark disobeyed signals?

Mr. SEABURY.—We object to that question also. The issue here is not whether Mr. Clark was careless about obeying signals.

The COURT.—Suppose the evidence be conflicting on that point? Suppose, assuming that the evidence indicates—the evidence put in by the defendant here indicates—that he didn't respond promptly to the signal to stop or didn't cut off the steam. Now, there is an issue of fact. Would it not, under that circumstance, be competent to show that in other instances the defendant was likewise slow to respond to the signal, or careless?

Mr. SEABURY.—We think not. Assume for the sake of argument that he was careless—careless on other occasions—yet on the occasion of the injury he might have been proceeding with care.

The COURT.—Would it lend anything to the probability of the case?

Mr. SEABURY.—We think not, and contend it is absolutely incompetent to receive such evidence, even assuming that they have it to produce, which we do not concede.

The COURT.—The individual element—the human element— [662] is a factor in all these matters—some men are slow or quick to respond to signals of danger. Now, how is the jury to determine which of these contributing theories of fact is the true one unless they have all the light that can be thrown on that including the individual factor?

Mr. SEABURY.—We want them to have all the light that can be thrown upon the issue here. We say all that light comes from the evidence of these witnesses as to what took place on this occasion, and that can be the only test.

The COURT.—But suppose those witnesses are sharply conflicting.

Mr. SEABURY.—Then it is for the jury to determine.

The COURT.—Then may they not consider which the more probable theory?

Mr. SEABURY.—That may be true, but we say they may not consider which is more probable if it is based on evidence which is not competent because it does not relate to the matter involved.

The COURT.—But Mr. Clark was there—he was the actor in the matter. Suppose his hearing or sight was bad and sharp hearing or sight had something to do with his conduct, would it not be admissible to show his defective hearing or acuteness of *sight* or defective sight or acuteness of sight as the case may be?

Mr. SEABURY.—We think not, and we say further in answer to that that if he had any defective

sight or hearing it was the duty of the defendant to discover it.

Mr. KIBBEY.—He can't complain of that.

The COURT.—This evidence is only admissible on the theory that it shows contributory negligence.

[663] (Thereupon the question is argued further to the Court, the further argument not being taken down by the reporter.)

Mr. SEABURY.—There is another ground of objection. Any question however framed, calling for other acts, practically asks the witness to state whether he exercised care on those occasions or not—the question is practically did he exercise care on other occasions.

The COURT.—I am in doubt about it. The objection will be sustained. I think it is safer.

Mr. McFARLAND.—We except. Now, I desire to put the question a little more definitely so as to get it into the record in better shape.

The COURT.—You may do so.
(By Mr. McFARLAND.)

Q. Do you know of any instances on other occasions previous to this accident where Mr. Clark failed or refused to obey signals given him?

Mr. SEABURY.—We make the same objection.

The COURT.—The objection is sustained.

Mr. KIBBEY.—May we, in order to preserve our record, state what we desire to prove?

The COURT.—I think it is already apparent. The argument has developed that.

Mr. McFARLAND.—If there is any doubt about it, we would like to state it.

Mr. SEABURY.—We object to the statement of what they desire to prove, and ask that counsel put their question to the witness. I shall object to any offer made for the purpose of a bill [664] of exceptions.

The COURT.—I think this conference is absolutely unnecessary. I think if a bill of exceptions is necessary to be prepared in this case the Court can find upon the record here enough without stating—repeating the statements—to put into the bill of exceptions to indicate the purpose of this offer. That is all you desire.

IX.

That the Court erred in that part of its charge limiting and qualifying the general rule of the assumption of the risk as follows:

“But that principle of assumption of risk does not apply unless the danger is one that is so open and obvious as to be readily observable by a person of ordinary intelligence in his situation by the exercise of his powers of observation so far as consistent with his duty as such employee. Another condition affecting the doctrine of assumption of risk is that the plaintiff must not only have seen the dangers but also have appreciated them. In determining this question, you have a right to take into consideration the nature of the employment that plaintiff was engaged in, and whether the duties of such employment prevented the plaintiff from making a close inspection, his opportunity to observe and take notice of the dangers of his employment at the time injured, and whether or not his opportunity for mak-

ing such close inspection of the dangers was in any way affected by his other duties, and whether the requirements of his services as such engineer also affected his capability of comprehending the dangers which might otherwise have been more plainly visible to one not so engaged.

[665] Now, to the doctrine of assumption of risk, it should be added that if certain of the dangers or dangerous conditions attending the work were so open and apparent that the plaintiff could be held to assume the risk under the rule I have stated, but if there were other dangers not open and visible, and but for this latter class of dangers the injuries would not have happened, then the fact that he is chargeable with the assumption of risk in a portion of the dangers would not prevent recovery if the dangers with which he is chargeable would not in themselves have produced the injury.

To the doctrine of the assumption of risk should be added the further qualification that the plaintiff did not assume the risk of any danger which arose in whole or in part from the negligence of any officer, agent or employee of the defendant.

X.

That the Court erred in that part of its charge in reference to the rule of damages in stating that, "If the plaintiff is guilty of contributory negligence and his negligence and that of the defendant company be equal, the jury will then give an award of one half of the damages it would have given if he had been free from negligence; but if he be twice as negligent as the defendant company then a third will be the

proportion of the damages he will receive, and so on, whatever the proportion may be.”

XI.

That the Court erred in instructing the jury on the [666] subject of negligence and contributory negligence as follows:

“That is, subject to the qualification that if the contributory negligence or the negligence of the plaintiff was so wilful and of such a character as that the jury might say that it was the direct and proximate cause of the injury, then the plaintiff could not recover by reason of such negligence. The distinction between the two cases being that the negligence of the plaintiff in the one case, instead of being a contributing cause, was so gross, so wilful and extended to such an extent as that the jury may say that it was the direct and proximate cause of the injury.”

XII.

That the Court erred in instructing the jury that the omission of the plaintiff to obey a signal given him to stop, by the prompt obedience of which he might have stopped and averted the injury, must be “wilful and intentional” to exempt the defendant from liability for the alleged injury.

XIII.

That the Court erred in sustaining plaintiff's objections to the testimony of Dr. Stark, a witness offered by defendant to prove the condition of plaintiff in respect to the injuries alleged to have been received at the date of the accident, and particularly as to the condition of plaintiff's eye, about two

months subsequent to the date of the alleged injuries, it not having been shown that the relation of physician and patient existed between the witness and the plaintiff at the time. The evidence as to the [667] incompetency and disqualification of the witness is as follows:

Dr. H. H. STARCK, being called as a witness in behalf of the defendant and duly sworn, testified as follows:

Direct Examination.

(By Mr. KIBBEY.)

Q. What is your name?

A. Dr. H. H. Starck.

Q. Where do you reside? A. El Paso, Texas.

Q. What is your business?

A. Physician and surgeon.

Q. How long have you been engaged in the practice? A. Sixteen years.

Q. And where?

A. St. Louis and El Paso—two years in St. Louis and fourteen years in El Paso.

Q. Are you a graduate of any medical college?

A. I am a graduate of the medical department of St. Louis University.

Q. Have you had any other educational opportunities?

A. Yes, I had a certificate of work with the University of Vienna, the University of Prague, and the Royal London Ophthalmic in London.

Q. Have you made any special department of medicine or surgery your business?

A. Eye and ear work.

[668] Q. For what length of time?

A. I have done nothing but that for the last six years.

Q. Do you know the plaintiff in this case, T. P. Clark? A. Yes, sir.

Q. How long have you known him?

A. I have known him since June a year ago.

Q. Where did you see him? A. At Clifton.

Q. At whose instance did you see him?

A. Mr. A. T. Thompson.

Q. Mr. Thompson was at that time connected with the defendant railway company?

A. Yes, sir. I don't know what his position was at that time—he was the head of it.

Q. He employed you to visit Mr. Clark, did he?

A. Yes, sir.

Q. Where did you see Mr. Clark?

A. At Clifton.

Q. Where in Clifton?

A. At the A. C. Hospital.

Q. Did you make any examination of him at that time?

A. Yes, sir, I made an examination of his eyes.

Q. State what examination.

Mr. SEABURY.—We object to the question, and ask leave to cross-examine this witness for the purpose of showing the [669] witness' disqualification and incompetency.

The COURT.—Very well.

(By Mr. SEABURY.)

Q. You say this examination took place in June, 1911? A. Yes, sir.

Q. At the hospital of the defendant company in Clifton? A. Yes, sir.

Q. Under the direction of Mr. Thompson?

A. Under his personal direction, you mean?

Q. Yes.

A. It was at his request I examined him. I came there especially for that purpose.

Q. Did Mr. Thompson or the defendant company conduct the hospital?

A. No, but it is the only place I have to make such examinations.

Q. You wouldn't go there and make an examination simply because Mr. Thompson said so?

A. Yes.

Q. Without consulting the medical force?

A. Yes, sir, if he wanted the case examined, because he is in charge of the whole road.

Q. Now, were you at that time in the employ of the defendant company? A. No, sir.

Q. Did you have any connection or affiliation with [670] its medical department? A. No, sir.

Q. Or with its hospital? A. No, sir.

Q. Did Mr. Thompson pay you any fee?

A. He paid me for the examination.

Q. He did? A. Yes, sir.

Q. How long did the examination take?

A. Why, it probably took—I don't know—probably took a half or three-quarters of an hour.

Q. Did you recall what time of day it was?

A. You mean morning or evening?

Q. Yes.

A. No, I don't believe I do. I think it was in the

morning, though I am not sure.

Q. Who was present at the time you made the examination?

A. Mrs. Clark was present and—I don't know—you see the thing is situated this way: people are going in and out of the room all the time, so there might have been other persons present, perhaps Dr. Dietrich might have been present.

Q. Was this in a public ward of the hospital?

A. No, it is in the ex-ray room—the darkroom.

Q. In a single room you conducted the examination?

A. Yes, sir.

Q. Who was present?

A. Mrs. Clark was present. I had a conversation with her at the time. I know during a large part of the examination there was no one there but Mr. Clark, Mrs. Clark and myself.

Q. In other words, no other doctor was present.

A. Dr. Dietrich might have come in.

Q. Just in and out?

[671] A. I am not positive—I know he wasn't there all the time.

Q. Did he participate in the examination?

A. No, he did not.

Q. Had you met Mr. Clark before that?

A. No, I never had.

Q. Who introduced you to him?

A. I don't know—it might have been one of the nurses. I don't know who introduced me. I don't remember. That has been a year and a half ago.

Q. Do you know how you were introduced to him?

A. What do you mean?

Q. I mean how you were introduced to him—in what capacity? A. Me?

Q. Yes. A. No, I don't.

Q. Did you tell him you were a doctor?

A. Yes, I believe I did tell him—most of the introduction was done on my part. I told him I was up there to examine him and he consented to it.

Q. Did you tell him anything about any special employment for the company?

A. I don't remember whether I did or not.

Q. You don't think you did?

A. I don't remember.

Q. Now, Doctor, don't you know, as a matter of fact, that [672] Mr. Clark assumed you were one of the regular physicians of the defendant?

A. I am not able to tell what Mr. Clark assumed.

Q. That is what I asked you. If you don't know, that is the answer. You didn't tell Mr. Clark you were from El Paso?

A. Now, I don't know whether I did or not. I think perhaps Mr. Clark knew it.

Q. How do you think he perhaps knew it?

A. I think in the conversation that occurred that he said he had heard of me.

Q. That was after you had gotten into the examination, wasn't it? A. I don't know when it was.

Q. You don't remember? A. No.

Q. What is your best recollection on that subject? Do you think you discussed El Paso before or after you began to examine him?

A. I don't remember.

Q. You have no recollection on that?

A. That wasn't the important thing to me.

Q. It might have been of vital consequence to him as it is now? A. I don't know.

Q. How long did your examination take?

A. Between half an hour and an hour.

[673] Q. Did you derive any information concerning his condition except at that examination?

A. The condition of his eye?

Q. I mean of his general condition.

A. Only the conversation with him.

Q. Only from conversations with him at that interview? A. Yes, sir.

Q. That is the extent of your knowledge and acquaintance of the facts of his case?

A. Of course I knew he was injured before I came up.

Q. So your only knowledge was derived at that interview? A. As to the condition of his eye?

Q. Yes. A. Yes, sir.

Q. Did you make any other examination except as to the condition of his eye?

A. Other than that?

Q. Yes. A. No.

Q. The information which he gave you—was the information which he gave you necessary to enable you to treat his eye or to properly diagnose his case?

A. No, I think I could have made a diagnosis without him saying anything about it.

Q. You think you could?

A. Yes, you understand that is part of the routine of the examination—questioning a patient.

[674] Q. In other words, that is the only method

you have of securing the subjective symptoms.

A. Yes—objective symptoms, of course, we discover ourselves.

Q. So you can say that all the subjective symptoms that you discovered to exist in his case were derived from him on that occasion?

A. Yes, sir, that is right.

Mr. SEABURY.—Now, if your Honor please, I would like to call Mr. Thompson.

The COURT.—Very well.

A. T. THOMPSON, being recalled as a witness by counsel for the plaintiff for examination upon the question of the admissibility of the testimony of the witness Stark, and having been heretofore duly sworn in this case, testifies further as follows:

(By Mr. SEABURY.)

Q. Mr. Thompson, Dr. Stark has testified that you requested him to call and examine the plaintiff. Had you ever secured any consent from the plaintiff to permit Dr. Stark to examine him? A. No, sir.

Q. Do you know whether Mr. Clark knew that Dr. Stark was not one of the regularly employed physicians of the defendant?

A. I don't know what he knew.

Q. You do not? Dr. Stark testified that you compensated him for his attendance upon Mr. Clark on this occasion. He didn't [675] mean that you compensated him out of your own pocket?

A. No, sir.

Q. You did not so compensate him? A. No, sir.

Q. Isn't it a fact that you compensated him out of the funds of the defendant? A. Yes, sir.

Q. Isn't it a fact that the funds came from the Hospital fund to which the plaintiff among others contributed? A. No, sir.

Q. From what fund did it come?

A. That was charged direct against the Arizona and New Mexico Railway, for it was in the nature of a special fee and wasn't subject to the society's fund.

Q. Isn't it a fact that the defendant maintains a so-called medical department or hospital?

A. Yes, sir, it did at that time.

Q. Will you please tell us what the privileges to workmen in the employ of the defendant included with reference to medical attention in such department?

A. It included every medical attention—every care in the hospital in case of injury.

Q. Every medical attention and all the facilities of the hospital? A. Yes, sir.

Q. That includes, of course, the diagnosis of a man's [676] injuries at the company's hospital?

A. Oh, yes.

Q. And there was no limitation or restriction, was there, as to the kind of medical attention which the company was to accord the injured employee?

A. No, there was no limitation, if I understood you right.

Q. No difference between a general and a specially employed doctor?

A. It is a recognized thing that the company has its own physicians and surgeons, and these are the men that attend to any patients—company patients—who may go into the hospital and who are entitled

under the fees they have paid into the society for their attendance.

Q. But the fact is, as you have already stated, that the defendant did compensate Dr. Stark for his medical attendance upon the plaintiff in this particular instance? A. Yes, sir.

Q. I ask if there was anything that you know of which would disclose or tend to disclose to the plaintiff any difference in Dr. Stark's connection with the defendant and other physicians who were in attendance upon him?

A. I cannot conceive how Mr. Clark would connect Dr. Stark with the society in any way.

Q. It is a fact that the examination took place in the hospital?

A. So the doctor says. I don't know where it took place.

[677] Q. Is it the defendant's or the Arizona Copper Company's?

A. It doesn't really belong to the railroad company or the Copper Company. It belongs to the society. (By Mr. KEARNEY.)

Q. Has the society any legal existence as a copartnership or a corporation?

Mr. McFARLAND.—That is a legal conclusion.

Mr. KEARNEY.—Do you know as a matter of fact whether it has articles of incorporation?

The COURT.—What difference does it make?

Mr. KEARNEY.—My information is that it is only separate in name—neither a copartnership nor a corporation.

Mr. McFARLAND.—It is immaterial whether it is

a copartnership or a corporation.

The COURT.—I don't think that makes any difference here.

Mr. SEABURY.—I renew the objection already urged. I think we have shown the existence of the relation of patient and physician to have existed between this witness and the plaintiff.

The COURT.—I don't think you have shown the existence of the relation of physician and client. The best that you can say in that behalf is that the plaintiff may have understood that any communication he gave to the doctor that that relation existed. Under the testimony thus far adduced the fact is just otherwise.

Mr. SEABURY.—But, if your Honor please, we claim as a [678] matter of law that when a company undertakes to supply medical treatment to its employees who are injured and actually makes a reduction from the salary or wages of the employees—

The COURT.—I understand all that.

Mr. SEABURY.—That the lips of that physician are absolutely sealed just as though the retainer had been paid by the plaintiff himself.

The COURT.—That is unquestionably true, and on that theory I ruled out the declarations of Dr. Dietrich.

Mr. SEABURY.—We claim, further, that there is no difference as a matter of law between special employment and a general one.

The COURT.—I understand this examination was in reference to this lawsuit.

Mr. SEABURY.—There is no testimony to that effect.

The COURT.—The inference is quite plain from this evidence that this examination was not for the purpose of treatment at all.

Mr. SEABURY.—I don't know what the purpose of it was.

The COURT.—If it was, of course then that ends it.

Mr. SEABURY.—Suppose it was for the purpose of negotiating a settlement, it would be improper for us to go into the purpose.

The COURT.—It must be established that he was Mr. Clark's physician.

Mr. SEABURY.—We admit that, but we think that under these circumstances he has the right to claim it.

Q. You don't think from Mr. Thompson's statement that the [679] employment of the doctor was under that society arrangement, whatever that was? He stated quite the contrary.

Mr. SEABURY.—I think it was a special arrangement, undoubtedly. He has testified the remuneration did not come out of that special fund, but I don't think that would change the course of conduct of the defendant.

The COURT.—The thing in my mind is simply this: Whether the relation which the doctor sustained was made quite clear or whether the plaintiff knew or whether from the circumstances he had a good reason—was put upon notice—that the doctor was not there as his physician in any capacity representing the society or anybody else.

Mr. SEABURY.—Then the surrounding circum-

stances do have a bearing for the purpose of this inquiry, whether the relation did exist. That is what I had in mind when we showed all the surrounding circumstances. He examined him under the same circumstances as he might have been previously examined under in the hospital under a doctor of the association.

The COURT.—It doesn't make any difference where it occurred, in his house or elsewhere, if he was there as a hostile witness to get information—not for his benefit, but for somebody else's benefit, and if the plaintiff understood that at that time, he certainly—the communication, whatever it was, was certainly not privileged.

Mr. SEABURY.—May I ask if the plaintiff understood that there was no difference between this doctor and Dr. Dietrich, for example? Would that effect the court?

[680] The COURT.—I am inclined to think so. The only thing is whether the circumstances were such as to put Clark upon notice. If he permitted this examination and made statements under the impression and belief that this doctor was there in his interest as his physician, it is privileged in my judgment—whether the fact be one thing or another—it is the attitude which the plaintiff had in the matter.

Mr. SEABURY.—May I call the plaintiff to ascertain what he understood in this matter?

The COURT.—Yes.

THOMAS P. CLARK, the plaintiff, being recalled as a witness by counsel for the plaintiff upon the question of the admission of the testimony of the

witness Stark, and having been heretofore duly sworn in this case, testifies further as follows:

(By Mr. SEABURY.)

Q. Mr. Clark, do you remember the day Dr. Stark examined you?

A. I remember him examining me very well.

Q. Had you ever seen him before that?

A. No, sir.

Q. Had you been examined by any other doctors of the defendant in the same place? A. No, sir.

Q. You never had? A. No.

[681] Q. You knew, however, that that was the hospital? A. Yes, sir.

Q. Did you know where the hospital was and what it was? A. Yes, sir.

Q. Tell us what the hospital was where you were examined. A. They call it the A. C. Hospital.

Q. Is that, or is it not, the hospital in which injured employees of the defendant are examined?

A. Yes, sir.

Q. Did you know that to be the fact at the time of your examination? A. Yes, sir.

Q. Who was it that requested you to be examined, if anyone, by Dr. Stark?

A. I think it was Dr. Dietrich.

Q. You think Dr. Dietrich suggested it.

A. Yes, sir. He told me when he would be there.

Q. Was anything said to you in reference to the purpose for which that examination was requested or required? A. To examine my eye.

Q. Dr. Dietrich was then in attendance upon you as your physician?

A. I was still under his charge.

Q. Now, did you think this examination by Dr. Stark was to be made for the benefit of the company or for your benefit? [682] A. I don't know.

Q. You don't know for whose benefit it was to be made? A. For my benefit, I suppose.

Q. Is that what you understood? A. Yes.

Q. Did you or did you not believe that Dr. Stark was in consultation with Dr. Dietrich, your attending physician? A. Yes, sir.

Mr. KIBBEY.—You are leading him right along.

The COURT.—I think the communication is privileged—I will sustain the objection.

(By Mr. KIBBEY.)

Q. You say Dr. Dietrich was there?

A. He might have been in and out.

Q. As a matter of fact he wasn't in town, was he?

A. Yes, sir, I think so.

Q. You had a conversation with Dr. Stark, didn't you? A. Yes, sir.

Q. In the course of that conversation did you state to Mr. Stark that you found on the third day after the injury that you had lost the vision of your eye?

Mr. SEABURY.—We object to the question.

The COURT.—I sustain the objection.

(By Mr. KIBBEY.)

Q. Didn't you state to Dr. Stark that you had not had any injury to your head—received any injury to your head in that accident?

[683] Mr. SEABURY.—We make the same objection.

The COURT.—Same ruling.

(By Mr. KIBBEY.)

Q. Had you and the company had any talk prior to that time with reference to your condition—your ability to go to work or anything of that kind?

Mr. SEABURY.—We object.

The COURT.—Is this a general examination—isn't it as to this matter of the competency of this doctor?

Mr. KIBBEY.—I am trying to get to the matter of the competency of this doctor.

Mr. SEABURY.—The question is did you have any talk with the company. I don't see what—

The COURT.—You may answer.

The WITNESS.—No, sir.

(By Mr. KIBBEY.)

Q. You had not had any talk with any of them up to that time? A. No, sir.

Q. Didn't you know that the company desired for its own information to have an independent doctor make an examination of your eye?

A. I told Dr. Dietrich about it and he made the appointment with the doctor, I suppose.

Q. Didn't Dr. Dietrich tell you the company wanted an examination made for their information as to your condition [684] and didn't you so understand it?

Mr. KEARNEY.—We object to that as a privileged communication.

The COURT.—I overrule the objection.

The WITNESS.—I told Dr. Dietrich about it and he tried to examine it himself, and then he made the date with Dr. Stark a few days afterwards.

Q. Didn't you understand it was for the information of the company, to find out what the condition of your eye was?

A. I supposed that was the object—very likely.

Q. You understood when the examination was made that it was for the purpose of getting information for the company? A. Yes.

Mr. KIBBEY.—Now, we think it is competent.

The COURT.—The answer is contradictory to the other.

Mr. SEABURY.—Absolutely, your Honor.

Mr. KIBBEY.—Yes, it is.

Mr. SEABURY.—However, we also claim that his direct examination shows much more facts and circumstances in connection with the matter than the mere answer to that one question, and I think from the witness' testimony both under cross and direct examination, that it is perfectly clear that he thought Dr. Dietrich called Dr. Stark as a consulting physician.

Mr. KIBBEY.—I think it is quite obvious to the contrary.

[685] Mr. SEABURY.—We differ in regard to the inferences to be drawn from the evidence. I don't see how the witness can really know—

The COURT.—I will put a question.

(To the witness.)

Q. What did you understand was the object of this examination of your eyes?

A. To know whether it was injured or not.

Q. What difference did it make whether it was injured or not in your judgment?

A. It would make a whole lot.

Q. In what way?

A. From good sight to blindness—I wanted that information.

Q. Who wanted it? A. I did.

Q. You wanted it?

A. I wanted to know the condition of it. When I reported to Dr. Dietrich he said they had no oculist and that they would get one, and then I left the thing to Dr. Dietrich, and when they made the appointment, I appeared there.

Mr. SEABURY.—We think that makes it too clear, your Honor.

The COURT.—I think so.

[686] (By Mr. KIBBEY.)

Q. Did you know that Dr. Stark did not belong to the society's corps of physicians? A. To what?

Q. To the society's staff?

A. No, I didn't know anything about it.

Q. Had you ever seen him before?

A. Not that I know of.

Q. Did you ever hear of his attending anyone else there before?

A. You say Dr. Dietrich or Dr. Stark?

Q. Dr. Stark.

A. I never heard of him at all.

Q. Had you heard of him before?

A. No, sir.

Q. You knew he came from El Paso?

A. I heard that.

Q. You heard that before?

A. I heard it at the examination. Dr. Dietrich

said he would have their man.

Mr. KIBBEY.—That is all.

XIV.

That the Court erred in refusing to give to the jury instructions offered by the defendant as follows, to wit:

“If you should believe from the preponderance of the evidence in this case that the defendant permitted the cut of [687] four cars to remain upon the main line after the engine had been detached therefrom, without having set the brakes thereon or having chocked the wheels, so as to prevent their rolling by their own gravity, and if the plaintiff was apprized of danger of any kind by a signal which the plaintiff knew signified an emergency under the practice in the operation of railroads in like circumstances was equivalent to an order by the defendant to stop as quickly as the appliances and means of operation under the control of the plaintiff would enable him to stop, and if it appears that the plaintiff could have stopped and so avoided the collision from which his alleged injuries resulted, and that he failed to do so, the proximate cause of the injury was his own negligence, and he cannot recover in this case.”

“If you believe that the movement of the four cars in question could not, under all the circumstances, have been reasonably prevented, then such movement must be attributable to accident, and if such movement was an accident, the defendant is not liable in this case.”

“Even if the defendant left the cars under the cir-

cumstances detailed in this case, on the main line with the brakes unset, and if the cars by reason of gravity did move to and upon the switch to the point of the collision, yet if plaintiff was warned of danger, or was given a signal which required him to immediately stop his engine within time had he promptly obeyed the signal to have stopped, and thus avoid the collision, and he negligently, or purposely, did not do so, then the negligence of the defendant if any, is not the proximate [688] cause of the alleged injury, and the plaintiff cannot recover.”

“If after giving consideration to the conditions of the tracks in question, and all the surrounding facts and circumstances proven in the case, the jury believes that at the time of the accident in question the condition of the track in question and the handling and moving of the cars in question thereon was being performed in the manner usually adopted in well-managed and operated railroads and generally recognized as good railroading, then the defendant was not guilty of negligence and in so maintaining its railroad and operating its cars thereon in the manner in which it did so.”

“You are instructed that one entering into the service of the defendant with knowledge, actual or constructive, of the defects in the defendant’s roadbed, or knowledge, actual or constructive, of the methods employed by the defendant in the operation of its cars in switching upon its main line, switches and industrial tracks, and remains in the service of the defendant with such knowledge, actual or constructive without complaint, that he assumes all ordinary

risks incident to his employment, and if injury results from such defects in its roadbed or by such methods of operation of its cars, that by such acquiescence he assumes the risk of injury, and cannot recover."

XV.

Because the Court further erred in that part of its charge wherein it instructed the jury that in order to relieve the [689] defendant from liability on account of negligence, the negligent conduct of the plaintiff must be wilful and wanton.

XVI.

Because the damages assessed by the jury are excessive.

XVII.

That the evidence at the trial was insufficient to justify the verdict of the jury.

XVIII.

That the verdict of the jury is against the law.

XIX.

That the Court erred in sustaining objections to testimony of Dr. Dietrich, whose deposition was offered in evidence, for the reason that the objections offered by plaintiff on the ground that it was privileged were waived by the plaintiff by filing cross-interrogatories to be propounded to witness, and the further reason that it was not shown that the relation of physician and patient existed between witness and plaintiff covering the time of treatment. The evidence *as this* relation is as follows:

Following is the stipulation:

[690] *In the District Court of the United States
for the District of Arizona.*

THOMAS P. CLARK,

Plaintiff,

vs.

THE ARIZONA & NEW MEXICO RAILWAY
COMPANY, a Corporation,

Defendant.

STIPULATION.

It is hereby stipulated and agreed by and between the parties plaintiff and defendant in this action, that the deposition of Dr. Henry Dietrich, a witness on behalf of the defendant, be taken before any person authorized to take depositions as provided for and designated under the provisions of subdivision 3 of Section 2515 of the Revised Statutes of Arizona, 1901, in any part of the world; that the direct and cross-interrogatories hereto attached shall go out with this stipulation, and the same propounded to said witness, and hereby waiving the issuance of any commission; that the deposition of said witness when so taken and returned may be read in evidence in this cause subject to the same objections and exceptions, as if said witness were personally present on the stand; that said deposition when so taken shall be certified to by the officer taking' the same, and shall be enclosed in an envelope addressed to the Clerk of the United States District Court, at Phoe-

nix, Arizona, U. S. A. This deposition may be used by either party to this cause.

Dated April 1st, 1912.

McFARLAND & HAMPTON,
Attorneys for the Defendant.
L. KEARNEY,

Attorney for the Plaintiff.

[691] Mr. McFARLAND.—If the Court please, we offer the deposition of Dr. Dietrich.

Mr. SEABURY.—We object to the offer in gross. This deposition was taken under a stipulation which expressly reserved all objections to the questions and answers the same as if the witness were personally present.

The COURT.—Who is Dr. Dietrich?

Mr. SEABURY.—He was the attending physician.

The COURT.—On what do you base your objection?

Mr. SEABURY.—We object to the offer in gross on the ground that the deposition was taken under stipulation and not in the usual course, and that the stipulation expressly reserved—

The COURT.—I understand; but what do you wish to object to now?

Mr. SEABURY.—We wish them to read such portions of it as they desire.

The COURT.—I thought that you objected to it in gross.

Mr. SEABURY.—I only objected to the offer in gross, if your Honor please.

The COURT.—Oh, very well.

Thereupon defendant's counsel reads from the deposition of Dr. Henry Dietrich, reading the interrogatories and answers from number one to number nine, inclusive, without objection on the part of plaintiff's counsel, as follows:

Q. 1. What is your full name?

[692] A. Henry Dietrich.

Q. 2. What is your business?

A. Physician and surgeon.

Q. 3. If you say physician and surgeon, please state how long you have been in the practice of medicine and surgery and what place you have practiced your profession.

A. Since 1898. Chicago, 1898-1900; Wardner, Idaho, 1900-1902; Morenci, Arizona, 1902-1906; Clifton, Arizona, 1906-1911.

Q. 4. State what medical college or colleges you attended and if you have diplomas from same.

A. Northwestern University Medical College, and Rush Medical College, Chicago; Diploma from Rush Medical College and Presbyterian Hospital, Chicago, Post-graduate study, Berne, Switzerland, 1906.

Q. 5. What experience have you had in surgery and at what place?

A. House physician and surgeon, Presbyterian Hospital, Chicago, 1898-1900; assistant surgeon, Warden Hospital, Warden, Idaho, 1900-1902; surgeon Longfellow Hospital, Morenci, Arizona, 1902-1906; chief surgeon Clifton Accident Benevolent Association Hospital, 1906-1911.

Q. 6. State the time covered in each place and the class or classes of cases in which you have had surgical experience.

A. Time as given under interrogatory 5. My experience covered the field of general surgery; it was not limited to any class of cases.

[693] Q. 7. Did you ever reside in the town of Clifton, Greenlee County (formerly Graham), State of Arizona? A. Yes.

Q. 8. If you say you did, state the time covered by this residence. A. 1906-1911.

Q. 9. If you say that you did at one time live in Clifton, state, if you can, the time that you left and where you have been since and what has been your business since you left.

A. I left in August, 1911. Went to Chicago and sailed for Europe in September, 1911. From October 1 to March 30, resided at Berlin, Germany, and from April 1st to date at Zurich, Switzerland. In both places I have been doing post-graduate medical work, principally on diseases of children.

Q. 10. State the object of your leaving, what you have been doing since you left and what you are now doing.

Mr. SEABURY.—We object to the statement of the object, although I don't think that it is material.

The COURT.—You may read the answer.

A. To do post-graduate medical work. I have been working in hospitals and am now doing so.

Q. 11. State when you will return.

A. I do not know.

Q. 12. If you say that you will return, at what place do you expect to locate.

A. I have not chosen a location. Some large city.

[694] Q. 13. State whether you were ever connected in any capacity with the Arizona and New

Mexico Railway Company, whose principal place of business is in Clifton, Arizona. A. Yes.

Q. 14. If you say that you were connected with this company, state in what capacity.

A. Chief surgeon of medical department.

Q. 15. If you say with the medical department of this railway company, please state what position you occupied in the medical department and how long.

A. Chief surgeon since 1906.

Q. 16. If you say that your position was that of chief surgeon with this company, state when this relation commenced and how long it existed.

A. From 1906 until August 1st, 1911.

Q. 17. Do you know one Thomas P. Clark?

A. Yes.

Q. 18. If you say that you do, state how long you have known him, what position, if any, he occupied in the service of the Arizona and New Mexico Railway Company.

A. Since 1906. Locomotive engineer.

Q. 19. If you know, please state how long he was in the service of the company and in what position.

A. I cannot state the exact number of years he was employed.

Q. 20. If you say in answer that you do know Mr. Clark, and that he occupied the position of engineer in this company, [695] state how long he was in this service as engineer.

A. I cannot say how long he was employed as engineer.

Q. 21. Do you know anything of an accident to Mr. Clark on or about the 15th day of March, 1911?

A. Yes.

Q. 22. If you say that you do, please state whether or not you saw Mr. Clark on that date, if not on that date, state when you first saw him after the accident.

A. I am under the impression it was Thursday, March, 16th. I saw him on the day of the accident about 10 o'clock A. M.

Q. 23. If you say that you did see him on the date of the accident or some date subsequent thereto, please state whether you examined Mr. Clark with reference to any injury he received on that occasion.

A. I did.

Q. 24. Describe particularly, if you can, the exact condition of Mr. Clark in respect to injury or injuries as you found them on the date of your examination.

Mr. SEABURY.—We object on the ground that it appears from the examination of this witness that he is incompetent to testify concerning the injuries received by Mr. Clark, under paragraph 2535, Revised Statutes of Arizona, 1901.

The COURT.—Yes.

Mr. KIBBEY.—It is not apparent that Mr. Clark was a patient of his.

[696] The COURT.—Isn't it apparent that he visited Mr. Clark to make the examination as a physician?

Mr. KIBBEY.—He might even do that.

The COURT.—Not if he was a physician and in charge of the case.

Mr. KIBBEY.—There is no evidence of that.

The COURT.—That will have to appear before

the evidence can go in, that he was not.

Mr. KIBBEY.—The presumption does not follow that he was, although the fact is that he was.

The COURT.—The evidence is already in that he was the physician in charge of the case. Mr. Clark said Dr. Dietrich called upon him. The objection is sustained.

Mr. KIBBEY.—We desire to except to the ruling of the Court.

Q. 25. Please state whether or not you treated Mr. Clark as physician or surgeon for the injuries you have described. A. I did.

Q. 26. If you say that you did, when did this treatment begin and when did it end?

Mr. SEABURY.—We object to that as within the scope of the objection already pointed out.

The COURT.—Yes.

Mr. KIBBEY.—By admitting the other questions, hasn't he waived his objection to subsequent questions along the same lines?

The COURT.—They can waive all of it or any part of it. [697] They have a right to object to any portion that you see fit to offer. It is within the province of the plaintiff to waive the privileged nature of the communication.

Mr. McFARLAND.—The position we take is that by crossing these interrogatories and permitting the witness to be examined without objection, that they waived that right.

The COURT.—My understanding was that the stipulation expressly reserved that.

Mr. McFARLAND.—Not what they stipulated to

do, but what they did do—that they went on and asked a number of questions—thirty or forty cross-interrogatories—and they were answered by Dr. Dietrich. Now, it seems to me that the position that the plaintiff would be in in respect to depositions taken before an officer would be the same as though the witness were present in court. They have the right to object to them but they didn't do it. The stipulation would be equivalent to the legal proposition that they could permit or waive.

The COURT.—Where is the stipulation?

Mr. SEABURY.—(Handing the stipulation to the Court.) That is as to the original deposition. Of course we were obliged absolutely to take the cross-examination at that time, and our stipulation went to the objections at this time.

[698] The COURT.—(After reading the stipulation.) I think the stipulation covers—reserves the right to object.

Mr. McFARLAND.—I think that is true, but I think it is a privilege that he might exercise or might not at his direction.

The COURT.—At this time, I think.

Mr. McFARLAND.—Please note our exceptions.

Q. 27. State where Mr. Clark was during the period covered by this treatment.

Mr. SEABURY.—We urge the same objection.

The COURT.—Same ruling.

Mr. McFARLAND.—Exception.

Q. 28. If you say that you found on your examination, injuries to his ribs, state on which side the injuries were to the ribs, the number of ribs involved

and the result of the treatment in this respect. (Same objection—same ruling—exception.)

Q. 30. If you say there were any injuries to the kidneys or either of them, state the result of your treatment. (Same objection—same ruling—exception.)

Q. 31. If you say there were bruises over the sacral-iliac joint, state the condition in this respect and the result of your treatment. (Same objection—same ruling—exception.)

Q. 32. You may state in detail, if you know the exact condition you found Mr. Clark in when you first examined him or treated him for the several injuries you have described and the result of this treatment. (Same objection—same ruling— [699] exception.)

Q. 33. If you examined his urine on the date of your first examination, you may state what you found in this respect, and the condition of his urine during the time covered by your treatment. (Same objection—same ruling—exception.)

Q. 34. State his temperature on the date of your first examination and during the time covered by your treatment. (Same objection—same ruling—exception.)

Q. 35. State whether you examined his pulse at the date of your first examination and during your treatment of him and if there were any indications of any disease or affliction of Mr. Clark other than those in reference to the injuries you have described. (Same objection—same ruling—exception.)

Q. 36. State whether you examined his lungs at

the date of your first examination and what were their condition. (Same objection—same ruling—exception.)

Q. 37. State if you know, if there were any indications of pneumonia in either of his lungs at the time you first examined them, or at any time covered by your treatment. (Same objection—same ruling—exception.)

Q. 38. If you say there were, state whether you treated him in this respect and the result of your treatment. (Same objection—same ruling—exception.)

Q. 39. If you say that you examined Mr. Clark at the date of the accident or afterwards, state whether there were any marks of violence or bruises on his head, face or eyes or [700] either of them. (Same objection—same ruling—exception.)

Q. 40. State whether at the time of your first examination, or afterwards during your treatment of him, he made any complaint or called your attention in any way to any trouble with his eyes or either of them.

Mr. SEABURY.—We object.

The COURT.—Same ruling.

Mr. KIBBEY.—Just a minute. Please read that question again. (Counsel reads the question.) We think that is competent, and made so by the testimony of Mr. Clark.

The COURT.—I don't think that changes the rule. It is not a question of whether it is contradictory in its nature or not, but it covered the whole subject matter.

Mr. KIBBEY.—It takes away from it the nature of privilege.

The COURT.—I think not, under the rule. My understanding is that the whole matter is privileged whether there are thirty people present or not.

Mr. KIBBEY.—The books state otherwise. If it is made in the presence of a number of people it shows that the patient doesn't care.

The COURT.—I think it covers the whole matter of communication as well as examinations, treatment, what he may have discovered, no matter if there be other sources of knowledge upon the same matter or not.

Mr. KIBBEY.—This is directed to a communication or lack of communication.

The COURT.—That is especially excepted.

[701] Mr. KIBBEY.—We take exception.

Q. 41. If you say he did, please state if you treated his eyes or either of them and the result of this treatment. (Same objection—same ruling—exception.)

Q. 42. If you say in answer to the above interrogatory that he complained of his eyes or loss of sight of his eyes or either of them, state whether you treated him for any trouble of his eyes and particularly with reference to the loss of vision of his eyes or either of them. (Same objection—same ruling—exception.)

Q. 43. Please state whether or not at the first examination you made of Mr. Clark or at any time subsequently during your treatment of him, did you discover any trouble with his eyes or either of them, or

whether he ever complained during the time covered by your treatment, of any defect or loss of vision of his eyes or either of them. (Same objection—same ruling—exception.)

Q. 44. State if at any time covered by your treatment of Mr. Clark for the injuries received, either during your treatment of them or at any time subsequent, did he complain of any trouble with his eyes or any defect or loss of vision of his eyes or either of them. (Same objection—same ruling—exception.)

Q. 45. If you say that he did, at a subsequent date, please state that date as near as you can remember. (Same objection—same ruling—exception.)

[702] Q. 46. If you state that Mr. Clark occupied quarters at his home in Clifton during your treatment of him for the injuries received, in this accident, state whether during that treatment he used his eyes in reading while confined to his home. (Same objection—same ruling—exception.)

Q. 47. If you say he did, state the extent to which he used his eyes in this respect or otherwise. (Same objection—same ruling—exception.)

Q. 48. State whether during this time he made any complaint or called your attention to any defect or loss of vision of his eyes or either of them. (Same objection—same ruling—exception.)

Q. 49. You may state in a general way or in detail any fact or circumstance connected with your treatment of Mr. Clark for injuries received as a result of this accident and particularly in reference to any trouble with his eyes or loss of vision while

under your care as a patient, that you may consider proper or necessary in order to get at the facts in this case, as though you were especially interrogated in respect to same. (Same objection—same ruling—exception.) And this concluded the reading of the direct interrogatories.

Mr. SEABURY.—We offer no cross-examination, and we expressly offer no cross-examination in view of the Court's ruling.

[703] XX.

That the Court erred in overruling the defendant's motion for a new trial, for the reasons averred above in the more specific assignment of errors herein contained.

Wherefore the defendant says that for said manifest errors the judgment of the Court should be reversed.

W. C. McFARLAND and
KIBBEY & BENNETT,
Attys. for Defendant.

[Endorsements]: No. 14. (36.) In the District Court of the United States for the District of Arizona. Thomas P. Clark, Plaintiff, vs. The Arizona and New Mexico Railway Company, Defendant. Petition for Writ of Error and Assignment of Errors. Filed Feb. 24, 1913. Allan B. Jaynes, Clerk. By Frank E. McCrary, Deputy. W. C. McFarland and Kibbey, Bennett & Bennett, Attorneys for Defendant.

[Order Allowing Writ of Error, etc.]

*In the District Court of the United States for the
District of Arizona.*

AT LAW—No. 14.

THOMAS P. CLARK,

Plaintiff,

vs.

THE ARIZONA AND NEW MEXICO RAIL-
WAY COMPANY,

Defendant.

And now comes the defendant, by its attorneys, and filed [704] herein and presented to the Court, its petition, praying for the allowance of a writ of error, and assignment of errors intended to be urged by him, praying also, that a transcript of the record and proceedings and papers, from which the judgment was entered, duly authenticated may be sent to the United States Circuit Court of Appeals for the Ninth Judicial Circuit, and that such other and further proceedings may be had as may be proper in the premises.

On consideration thereof, the Court does allow the writ of error upon defendant giving bond, according to law, in the sum of Twenty Thousand (\$20,000.00) dollars, which shall operate as a supersedeas bond.

February 24, 1913.

RICHARD E. SLOAN,
Judge.

[Endorsements]: No. 14. In the District Court of the United States in and for the District of Ari-

zona. Thomas P. Clark, Plaintiff, vs. The Arizona & New Mexico Railway Company, Defendant. Order Allowing Writ. Filed Feb. 24, 1913. Allan B. Jaynes, Clerk. By Frank E. McCrary, Deputy. W. C. McFarland and Kibbey, Bennett & Bennett, Attorneys for Defendant.

*In the District Court of the United States for the
District of Arizona.*

No. 14.

THOMAS P. CLARK,

Plaintiff,

vs.

THE ARIZONA AND NEW MEXICO RAIL-
WAY COMPANY,

Defendant.

Supersedeas Bond.

KNOW ALL MEN BY THESE PRESENTS:

[705] That we, The Arizona and New Mexico Railway Company, as principal, and American Surety Company, a corporation, organized and existing under and by virtue of the laws of the State of New York and authorized to do business as a surety company in the State of Arizona, surety, are held and firmly bound unto Thomas P. Clark, defendant in error, in the full sum of Twenty Thousand (\$20,000.00) Dollars, the same being the amount of the supersedeas bond fixed by the District Court of the United States for the District of Arizona by order duly entered on the records of said Court on February 8th, 1913, to be paid to the said Thomas P. Clark, defendant in error, his heirs, legal repre-

sentatives or assigns, to which payment, well and truly to be made, we bind ourselves, and our and each of our successors, heirs, executors, administrators, legal representatives, jointly and severally by these presents.

Sealed with our seals and dated this, this 24th day of February, in the year of our Lord, one thousand nine hundred and thirteen.

WHEREAS, on the 18th day of October, 1912, at the District Court of the United States for the District of Arizona, in a suit pending in said Court between Thomas P. Clark, plaintiff, and The Arizona and New Mexico Railway Company, defendant, a judgment was rendered in favor of plaintiff and against the said The Arizona and New Mexico Railway Company, for the sum of Twelve Thousand Six Hundred Seventy-five (\$12,675.00) Dollars, and costs of action, and the said The [706] Arizona and New Mexico Railway Company has obtained a writ of error to reverse said judgment in the aforesaid action and filed a copy thereof in the clerk's office of said Court, and a citation directed to the said Thomas P. Clark, plaintiff, citing and admonishing him to be and appear at the United States Circuit Court of Appeals for the Ninth Circuit, to be holden at San Francisco, State of California;

Now, the condition of the above obligation is such that if the said The Arizona and New Mexico Railway Company shall prosecute its said writ of error to effect and answer all damages and costs, and if he

fail to make said plea good, then the above obligation to be void; else to remain in full force and effect.

THE ARIZONA AND NEW MEXICO
RAILWAY COMPANY,

By NORMAN CARMICHEAL,

Vice-Pres. & General Manager.

AMERICA SURETY COMPANY,

A Corporation Organized and Existing Under and
by Virtue of the Laws of the State of New York
and Authorized to Do Business as a Surety
Company in the State of Arizona.

By W. K. JAMES,

Resident Vice-president.

[Corporate Seal]

I. J. LIPSOHN,

Resident Asst. Secy.

The above and foregoing bond approved this 24th
day of February, 1913.

RICHARD E. SLOAN,

District Judge.

[707] [Endorsements]: No. 14. In the District
Court of the United States for the District of Ari-
zona. Thomas P. Clark, Plaintiff, vs. The Arizona
and New Mexico Railway Company, Defendant.
Supersedeas Bond. Filed Feb. 24, 1913. Allan B.
Jaynes, Clerk. By Frank E. McCrary, Deputy.
W. C. McFarland and Kibbey, Bennett & Bennett,
Attorneys for Defendant.

*In the District Court of the United States for the
District of Arizona.*

THOMAS P. CLARK,

Plaintiff,

vs.

THE ARIZONA AND NEW MEXICO RAIL-
WAY COMPANY,

Defendant,

Writ of Error (Copy).

The President of the United States to the Honorable
Judge of the United States District Court for
the District of Arizona, Greeting:

Because in the records and proceedings, as also in
the rendition of the judgment, of a plea which is in
the said District Court before you, between Thomas
P. Clark, plaintiff, and The Arizona and New Mexico
Railway Company, defendant, a manifest error has
happened, to the great damage of the said The Ari-
zona and New Mexico Railway Company, defendant,
as by its complaint appears, we being willing that
error, if any hath, shall be duly corrected, and full
and speedy justice done to the parties aforesaid in
this behalf, do command you, [708] if judgment
be therein given, that then under your seal, distinctly
and openly, you send the record and proceedings
aforesaid, with the things concerning the same, to the
United States Circuit Court of Appeals for the Ninth
Circuit, together with this writ so that you have the
same at San Francisco, California, in said Circuit,
on the 24th day of March, next, in said Circuit Court

of Appeals, to be then and there held, that the records and proceedings aforesaid be inspected, the said Circuit Court of Appeals may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, shall be done.

Witness, the Honorable EDWARD D. WHITE, Chief Justice of the Supreme Court of the United States, this the 24th day of February, A. D. 1913, and of the Independence of the United States the one hundred and thirty-fifth.

Allowed:

RICHARD E. SLOAN,
U. S. District Judge.

[Seal] Attest: ALLAN B. JAYNES,
Clerk of the United States District Court for the
District of Arizona.

By Frank E. McCrary,
Deputy.

Service of the within writ of error by receipt of a true copy thereof admitted this 24th day of February, 1913.

L. KEARNEY,
By W. M. SEABURY,
Attorneys for Plaintiff.

[709] [Endorsements]: (38.) No. 14. In the District Court of the United States in and for the District of Arizona. Thomas P. Clark, Plaintiff, vs. The Arizona and New Mexico Railway Company, Defendant. Writ of Error. Filed Feb. 24, 1913. Allan B. Jaynes, Clerk. By Frank E. McCrary, Deputy.

W. C. McFarland and Kibbey, Bennett & Bennett,
Attorneys for Defendant.

*In the District Court of the United States for the
District of Arizona.*

No. 14.

THOMAS P. CLARK,

Plaintiff,

vs.

THE ARIZONA AND NEW MEXICO RAIL-
WAY COMPANY,

Defendant,

Citation (Copy).

The President of the United States, to Thomas P.
Clark, and to L. Kearney and W. M. Seabury,
Your Attorneys, Greeting:

You are hereby cited and admonished to be and
appear at a session of the United States Circuit
Court of Appeals for the Ninth Circuit, to be holden
at the city of San Francisco, California, in said cir-
cuit, within thirty (30) days from the date of this
writ, pursuant to a writ of error filed in the clerk's
office of the District Court of the United States for
the District of Arizona, wherein The Arizona and
New Mexico Railway Company is plaintiff in error,
and you are defendant in error, to show cause, if any
there be, why the [710] judgment in said writ of
error mentioned should not be corrected, and why
speedy justice should not be done to the parties in
that behalf.

Witness the Honorable EDWARD D. WHITE, Chief Justice of the Supreme Court, this the 24th day of February, 1913, and of the Independence of the United States the one hundred and thirty-fifth.

RICHARD E. SLOAN,
United States District Judge for the District of Arizona.

Service of the within citation, by receipt of a true copy thereof, admitted this 24th day of February, 1913.

L. KEARNEY,
By W. M. SEABURY,
Attys. for Plaintiff.

[Endorsements]: (39.) No. 14. In the District Court of the United States in and for the District of Arizona. Thomas P. Clark, Plaintiff, vs. The Arizona and New Mexico Railway Company, Defendant. Citation. Filed Feb. 24, 1913. Allan B. Jaynes, Clerk. By Frank E. McCrary, Deputy. W. C. McFarland and Kibbey, Bennett & Bennett, Attorneys for Defendant.

*In the District Court of the United States in and
for the District of Arizona.*

No. 14.

THOMAS P. CLARK,

Plaintiff,

vs.

ARIZONA & NEW MEXICO RAILWAY COMPANY,

Defendant.

Praeipce for Transcript of Record.

[711] To the Clerk of the United States District Court for the State of Arizona.

You will please prepare a transcript of the complete record in the above-entitled cause to be filed in the office of the Clerk of the United States Circuit Court of Appeals for the Ninth Judicial Circuit under the Writ of Error to be perfected to said court in said cause, and include in said transcript the following proceedings, pleadings, papers, records and files, to wit:

Judgment-roll;

Transcript of Minute Entries;

Order Allowing Bill of Exceptions;

Bill of Exceptions;

Motion for New Trial;

Acknowledgment of Service of Bill of Exceptions;

Petition for Writ of Error;

Order Allowing Writ of Error;

Bond on Writ of Error;

Writ of Error;

Citation;

Praeipce for Transcript,—

and all other record entries, pleadings, proceedings, papers and filings necessary or proper to make a complete record upon said writ of error in said cause, said transcript to be prepared as required by law and the rules of this court and the rules of the United

States Circuit Court of Appeals for the Ninth Judicial Circuit.

W. C. McFARLAND,
JOS. H. KIBBEY,
Attorneys for Defendant.

[Endorsements]: No. 14. In the District Court of the United States in and for the District of Arizona. Thomas P. Clark, Plaintiff, vs. The Arizona and New Mexico Railway Company, Defendant. Praecipe for Transcript of Record. Filed Feb. 27, 1913. Allan B. Jaynes, Clerk. By Frank E. McCrary, Deputy. W. C. McFarland, Kibbey, Bennett & Bennett, Attorneys for Defendant.

[712] *In the District Court of the United States
in and for the District of Arizona.*

THOMAS P. CLARK,

Plaintiff,

vs.

ARIZONA AND NEW MEXICO RAILWAY
COMPANY, a Corporation,

Defendant,

[Praecipe for Additions to Transcript.]

To the Clerk of the District Court of the United States for the District of Arizona.

Dear Sir:

Please include in the record on appeal in the above-entitled cause, in addition to the matters required by the plaintiff in error, the amendments pro-

posed by the defendant in error to the bill of exceptions proposed by the plaintiff in error, and oblige,

Yours respectfully,

L. KEARNEY, .

By WILLIAM M. SEABURY,

Attorneys for Plaintiff.

306 Fleming Block,

Phoenix, Arizona.

[Endorsements]: No. 14. In the United States District Court. District of Arizona. Thomas P. Clark, Plaintiff, vs. The Arizona and New Mexico Railway Company, a Corporation, Defendant. Plaintiff's Praecipe for Additions to Transcript. Filed Mar. 8, 1913. Allan [713] B. Jaynes, Clerk.

**[Proposed Amendments to Proposed Bill of
Exceptions.]**

*In the District Court of the United States for the
District of Arizona.*

THOMAS P. CLARK,

Plaintiff,

vs.

ARIZONA & NEW MEXICO RAILWAY COM-
PANY, a Corporation,

Defendant.

The plaintiff above named proposes that the defendant's proposed Bill of Exceptions served herein on December 6th, 1912, be amended as follows:

1. By requiring the defendant to strike out and omit from its proposed Bill of Exceptions all of the

evidence presented therein, except so much thereof as may be necessary to present clearly the questions of law involved in the rulings of the Court to which exceptions are reserved.

2. By requiring the defendant to set forth in condensed and narrative form so much of the evidence as may properly be embraced in said Bill of Exceptions, save as a proper understanding of the questions presented may require that parts of it be otherwise set forth.

3. By striking out the last ten (10) lines of page 332, of the Proposed Bill of Exceptions and the first five (5) lines of page 333 of such Bill upon the ground that the statement therein contained was not in fact made at the trial of said cause and that said portion of said Bill be further amended [714] by inserting therein the following:

Mr. KIBBEY.—Now, I want to get it into the record, and I would like to state it in writing just what I expect to prove.

The COURT.—Very well, that may be done.

Mr. KIBBEY.—May the record show that we offer Doctor Smith for the same purpose and that his testimony is excluded?

The COURT.—Doctor Smith?

Mr. KIBBEY.—Yes.

The COURT.—He is one of the physicians of the company?

Mr. KIBBEY.—Yes.

Mr. SEABURY.—And may it also show that if permitted to cross-examine Doctor Smith we will adduce the same testimony as already adduced?

The COURT.—With reference to his disqualification?

Mr. SEABURY.—Yes.

The COURT.—Very well.

4. By striking out all of page 348 of the proposed Bill of Exceptions except the first seven (7) lines thereof, and by striking out all of pages 349, 350, 351 of said proposed bill upon the ground that the matter which appears upon said pages presents no question for review. Upon the further ground that such statement is improper for any purpose and was presented after the close of all of the evidence, while the permission granted by the Court to the defendant allowed the [715] submission of an offer of proof provided only that said offer should be submitted before the close of the evidence. Upon further ground that to allow the defendant to make such an offer of proof at this time deprives the plaintiff of his right to establish the disqualification of the witness whose alleged evidence is thus sought to be presented to the Court, from all of which it might appear that the trial court committed error in the exclusion of such proof as was offered while no error in law was actually committed by such Court.

5. By requiring the insertion of such of the interrogatories addressed to the witness, Doctor Dietrich and the answers made thereto as were read to the Court and jury in the place of the statements on pages 311, 312, 313, 314, 315, of said Proposed Bill of Exceptions, relating thereto.

6. By striking out the last five (5) lines of page 15 of said Proposed Bill, and all of pages 16, 17, 18,

19, 20, 21, 22, 23, and 24, all of which pages appear subsequent to the charge of the Court in said Proposed Bill, upon the ground that none of the alleged errors set forth upon said pages or any of them were called to the Court's attention before the jury had agreed upon a verdict or in time to enable the Court to correct any of the alleged errors of which defendant now seeks to complain, and upon the further ground that none of the exceptions alleged to have been taken upon the delivery of the Court's charge were in fact so taken, and upon the further ground that the taking of exceptions to the Court's charge [716] long after the rendition of an adverse verdict is not authorized, but is expressly prohibited by the rules of practice of this court, in such case made and provided.

7. By striking out the word "protected" in the thirteenth (13) line of page 91, and inserting the word "professional" in the place thereof.

8. By striking out the words "qualification and competency" in line six of page 317, and inserting in the place thereof respectively the words "disqualification and incompetency."

9. By striking out the word "proper" in line sixteen (16) of page 325, and inserting in the place thereof the word "improper."

WHEREFORE, the plaintiff prays that each of his proposed amendments be allowed.

Dated December 16, 1912.

L. KEARNEY,
Attorney for Plaintiff.

WILLIAM M. SEABURY,
Of Counsel.

To Messrs. McFarland & Hampton, and Kibbey,
Bennett & Bennett, Attorneys for Defendant.

[Endorsements]: No. 14. (33.) In the District Court of the United States for the District of Arizona. Thomas P. Clark, Plaintiff, vs. Arizona & New Mexico Railway Company, a Corporation, Defendant. Proposed amendments to the proposed Bill of Exceptions. Original. Filed Dec. 16, 1912, at 10 A. M. Allan B. Jaynes, Clerk. By Francis D. Crable, Deputy. [717] L. Kearney, Attorney for Plaintiff. William M. Seabury, of Counsel.

*In the District Court of the United States for the
District of Arizona.*

THOMAS P. CLARK,

Plaintiff,

vs.

THE ARIZONA AND NEW MEXICO RAIL-
WAY COMPANY, a Corporation,

Defendant,

Additional Amendment to Bill of Exceptions.

Plaintiff moves, in addition to the amendments and corrections already proposed by him, that the bill of exceptions herein be amended, on page 331, follow-

ing line 10 from top thereof, by adding to the answer of witness Thomas P. Clark the following, to wit:

“I thought the examination by Dr. Stark was for the purpose of treating my eye.”

Plaintiff moves the further amendment, in the testimony of witness Rebecca Manes (page A-16), following line 12 from top thereof, that the following be added:

“Clinic reports, Plaintiff’s Exhibit No. 1, of her testimony was not introduced in evidence.”

L. KEARNEY and

WM. M. SEABURY,

Attorneys for the Plaintiff.

[718] Service by copy admitted to have been made on us December —, 1912.

Attorneys for the Defendant.

[Endorsements]: No. 14. (34.) In District Court of the United States for District of Arizona. Thomas P. Clark vs. The Arizona and New Mexico Railway Company, a Corporation. Additional Amendments to Bill of Exceptions. Filed December 17, 1912. Allan B. Jaynes, Clerk. By Frank E. McCrary, Deputy. Copy Received Dec. 17, 1912. Kibbey, Bennett & Bennett, Defendant’s Attys.

[719] *In the United States District Court for the
 District of Arizona.*

No. 14.

THOMAS P. CLARK,

Plaintiff,

vs.

THE ARIZONA AND NEW MEXICO RAIL-
WAY COMPANY,

Defendant.

Certificate of Clerk of U. S. District Court to Record.

United States of America,
District of Arizona,—ss.

I, Allan B. Jaynes, Clerk of the United States District Court for the District of Arizona, do hereby certify that the foregoing pages, numbered 1 to 718, inclusive, together with Plaintiff's Exhibits 1, 2, and 3 and Defendant's Exhibits "A" and "B," constitute and are a true, complete and correct copy of the record, pleadings, testimony and all proceedings had in said action as the same remain on file and of record in said District Court, and that the same, which I transmit, constitute my return to the annexed Writ of Error lodged and filed in my office on the 24th day of February, 1913. I also annex and transmit the original citation in said action.

I further certify that the cost of preparing and certifying to said record amounts to the sum of \$431.50, and that the same has been paid in full by the defendant and plaintiff in error, The Arizona and New Mexico Railway Company.

In testimony whereof, I have hereunto set my hand

and affixed the seal of said District Court at the City of Phoenix, [720] in said District of Arizona and in the Ninth Judicial Circuit, this 19th day of March, A. D. 1913, and the Independence of the United States of America, the one hundred and thirty-seventh.

[Seal]

ALLAN B. JAYNES,

Clerk of the United States District Court for the District of Arizona.

[Endorsed]: No. 2259. United States Circuit Court of Appeals for the Ninth Circuit. The Arizona and New Mexico Railway Company, a Corporation, Plaintiff in Error, vs. Thomas P. Clark, Defendant in Error. Transcript of Record. Upon Writ of Error to the United States District Court of the District of Arizona.

Received March 24, 1913.

F. D. MONCKTON,

Clerk.

Filed March 24, 1913.

F. D. MONCKTON,

Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

By Meredith Sawyer,

Deputy Clerk.

[**Writ of Error (Original).**]

*In the District Court of the United States for the
District of Arizona.*

THOMAS P. CLARK,

Plaintiff,

vs.

THE ARIZONA AND NEW MEXICO RAIL-
WAY COMPANY,

Defendant.

The President of the United States, to the Honorable Judge of the United States District Court for the District of Arizona, Greeting:

Because in the records and proceedings, as also in the rendition of the judgment, of a plea which is in the said District Court before you, between Thomas P. Clark, plaintiff, and The Arizona and New Mexico Railway Company, defendant, a manifest error hath happened, to the great damage of the said The Arizona and New Mexico Railway Company, defendant, as by its complaint appears, we being willing that error, if any hath, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with the things concerning the same, to the United States Circuit Court of Appeals for the Ninth Circuit, together with this writ so that you have the same at San Francisco, California in said Circuit, on the 24th day of March next, in said Circuit Court of

Appeals, to be then and there held, that the records and proceedings aforesaid be inspected, the said Circuit Court of Appeals may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, shall be done.

Witness, the Honorable EDWARD D. WHITE, Chief Justice of the Supreme Court of the United States, this, the 24th day of February, A. D. 1913, and of the Independence of the United States the one hundred and thirty-fifth.

Allowed:

RICHARD E. SLOAN,
U. S. District Judge.

[Seal] Attest: ALLAN B. JAYNES,
Clerk of the United States District Court for the
District of Arizona.

By Frank E. McCrary,
Deputy.

Service of the within writ of error by receipt of a true copy thereof admitted this 24th day of February, 1913.

L. KEARNEY,
By W. M. SEABURY,
Attorney for Plaintiff.

[Endorsed]: No. 14. In the District Court of the United States in and for the District of Arizona. Thomas P. Clark, Plaintiff, vs. The Arizona and New Mexico Railway Company, Defendant. Writ of Error. Filed Feb. 24, 1913. Allan B. Jaynes, Clerk. By Frank E. McCrary, Deputy.

No. 2259. United States Circuit Court of Appeals for the Ninth Circuit. Original Writ of Error. Received Mar. 24, 1913. F. D. Monckton, Clerk. Filed Mar. 24, 1913. F. D. Monckton, Clerk U. S. Circuit Court of Appeals for the Ninth Circuit.

[Citation on Writ of Error (Original).]

*In the District Court of the United States for the
District of Arizona.*

No. 14.

THOMAS P. CLARK,

Plaintiff,

vs.

THE ARIZONA AND NEW MEXICO RAIL-
WAY COMPANY,

Defendant.

The President of the United States, to Thomas P. Clark, and to L. Kearney and W. M. Seabury, Your Attorneys, Greeting:

You are hereby cited and admonished to be and appear at a session of the United States Circuit Court of Appeals for the Ninth Circuit, to be holden at the city of San Francisco, California, in said circuit, within thirty (30) days from the date of this writ, pursuant to a writ of error filed in the clerk's office of the District Court of the United States for the District of Arizona, wherein The Arizona and New Mexico Railway Company is plaintiff in error, and you are defendant in error, to show cause, if any there be, why the judgment in said writ of error men-

tioned should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable EDWARD D. WHITE, Chief Justice of the Supreme Court, this the 24th day of February, 1913, and of the Independence of the United States the one hundred and thirty-fifth.

RICHARD E. SLOAN,
United States District Judge for the District of
Arizona.

Service of the within Citation, by receipt of a true copy thereof, admitted this 24th day of February, 1913.

L. KEARNEY,
By W. M. SEABURY,
Attys. for Plaintiff.

[Endorsed]: No. 14. In the District Court of the United States in and for the District of Arizona. Thomas P. Clark, Plaintiff, vs. The Arizona and New Mexico Railway Company, Defendant. Citation. Filed Feb. 24, 1913. Allan B. Jaynes, Clerk. By Frank E. McCrary, Deputy.

No. 2259. United States Circuit Court of Appeals for the Ninth Circuit. Original Citation on Writ of Error. Received Mar. 24, 1913. F. D. Monckton, Clerk. Filed Mar. 24, 1913. F. D. Monckton, Clerk U. S. Circuit Court of Appeals for the Ninth Circuit.

